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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1209

STATE OF OHIO, BY JAMES V. BARBUTO,
Appellees,

vs.

CHARLES E. AND ROBERT E. BUCKLEY
dba BUCKLEY'S AUTO WRECKING,
Appellants.

APPEAL FROM THE SUPREME COURT OF OHIO.

JURISDICTIONAL STATEMENT.

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. _____.

STATE OF OHIO, BY JAMES V. BARBUTO,

Appellees,

vs.

CHARLES E. AND ROBERT E. BUCKLEY
dba BUCKLEY'S AUTO WRECKING,

Appellants.

APPEAL FROM THE SUPREME COURT OF OHIO.

JURISDICTIONAL STATEMENT.

(A) OPINIONS BELOW.

The opinion of the Supreme Court of Ohio is reported at 16 Ohio State 2d 128 and appears at Appendix A. The Opinion of the Court of Appeals for the Ninth Judicial District, Summit County, Ohio appears at Appendix B. The Opinion of the Court of Common Pleas of Summit County, the trial court, appears at Appendix C. The Journal Entry of the Court of Common Pleas appears at Appendix D. The Journal Entry of the Court of Appeals appears at Appendix E.

(B) STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i) Nature of the proceeding and statutes involved.

This is an appeal from the Supreme Court of Ohio, affirming the Court of Appeals for the Ninth Judicial District, Summit County, Ohio, which reversed in part and affirmed in part the ruling of the Court of Common Pleas of Summit County holding that the statutes at issue were constitutional in part and unconstitutional in part. The decision of the Supreme Court and Court of Appeals was in favor of validity of the statutes which are claimed to be repugnant to the Constitution of the United States, and particularly to the Fourteenth Amendment.

(ii) Judgment to be reviewed.

The judgment of the Supreme Court of Ohio was entered on December 31, 1968 and appears at Appendix F. The Notice of Appeal was filed in the Supreme Court of Ohio on March 21, 1969.

(iii) Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (2).

(iv) The following cases are believed to sustain the jurisdiction.

Berman v. Parker, 348 U. S. 26;
Nashville, C. & S. Ry. v. Walters, 294 U. S. 405;
Pumpelly v. Green Bay Co., 13 Wall. 166;
United States v. Lynah, 188 U. S. 445;
Memphis & C. R. Co. v. Pace, 282 U. S. 241;
Welch v. Swasey, 214 U. S. 91;
Nectow v. Cambridge, 277 U. S. 183;
Southern Railway v. Virginia, 290 U. S. 190.

(v) The Statute whose validity is involved.

The statutes involved are Ohio Revised Code Sections 4737.05 through 4737.11 and 4737.99 (Appendix G), hereinafter referred to as the "statutes," which require junk yards, outside a municipality, to be licensed. To be entitled to a license, if the junk yard is within one thousand feet of a state or county road, or within three hundred feet of a township road, it must be so located that the view thereof from such road is obscured by natural objects or a fence (defined as an enclosure, at least six feet in height, constructed of non-transparent material, and maintained so as to obscure the junk in the enclosure from the ordinary view of persons passing upon the state, county, and township roads). The license is issued by the county auditor, the county sheriff is required to inspect the yard and submit a written report of the examination, twice annually, to the county auditor, and when the prosecuting attorney or attorney general *are of the opinion* that the yard is operated or maintained in violation of the statutes, he may apply, in the name of the State, to a court of competent jurisdiction praying for an injunction or other proper relief. The court may order the junk yard abated as a nuisance or make such other order as is proper. Scrap yards were specifically exempted from the statutes. The statutes became effective January 1, 1964. Persons operating junk yards prior thereto were allowed one year to erect the fence it required.[1]

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[1] Compare the Ohio statutes with the Federal *Highway Beautification Act of 1965*, Title 23, United States Code Section 136 (dealing with "control of junkyards"). The Federal Act applies only to junkyards within one thousand feet of the right of way along the Interstate and primary system of roads. Excluded from requirement of compliance are junkyards operated in areas which are zoned industrial by State law, or which are operated in areas not zoned industrial under authority of State

(Continued on following page)

(C) QUESTIONS PRESENTED.

Ohio Revised Code Sections 4737.05 through 4737.11 and 4737.99 are repugnant to the Constitution of the United States and to Section I of the Fourteenth Amendment thereto:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The issues determinative of the case are:

1. Is a statute, which is based solely on aesthetic considerations, an unconstitutional exercise of the police power?

2. Does a requirement that a junk yard be obscured from the ordinary view of persons passing on the roads take property without due process of law where the yard cannot be obscured due to topographical conditions?

3. Are the statutes vague and indefinite in the definition of fences, in creating a legislative nuisance by the lack of same, and in their provisions for enforcement?

(Continued from preceding page)

law, but are used for industrial activities. Yards, not exempt, must be screened or removed from sight. The government pays 75 per centum of the cost of screening and the State pays 25 per centum of the cost. Just compensation shall be paid to the owner of a junkyard subject to relocation, removal or disposal. To qualify for the maximum of Federal-aid highway funds, the State must enact laws meeting the above requirements. Pennsylvania (effective January 1, 1967) and other States have passed laws containing almost the identical provisions of the Federal Act, thereby qualifying for the maximum of Federal-aid highway funds. The Ohio statutes, passed *before* the Highway Beautification Act of 1965, do not contain the above safeguards, particularly as to "industrial use" and "compensation." Further, the Ohio Statutes apply to junkyards outside of municipalities, and on state, county or township roads.

4. Are the statutes unconstitutional by being not capable of uniform enforcement?

5. Do the statutes deny equal protection of the laws by being discriminatory in exempting scrap yards therefrom, as distinguished from auto wrecking yards?

6. Are the statutes unconstitutional in their application to Defendant Buckley's property?

(D) STATEMENT OF THE CASE.

Charles E. and Robert E. Buckley, doing business as Buckley's Auto Wrecking, hereinafter called Buckley, have operated an auto wrecking yard (defined in the statutes as a junk yard) at the premises since 1947, prior to the zoning law which was effective in 1957. The Buckley property is in the Akron metropolitan area, but outside the municipal limits. Garages, body shops, gas stations, and other businesses are in the area, which is urban, and contiguous to the City of Akron. Junked cars are deposited upon an unfenced wrecking yard located one thousand feet north of the Buckley property, and junked cars have been deposited upon other properties nearby. The trial court viewed the premises and in its opinion stated that the Buckley property was "* * * no more unsightly than several other commercial enterprises in the area * * *." (Appendix C, page 42) County, state, or township roads are on three sides of the property. Upon receiving notice of the statutes, Buckley promptly erected a six foot, non transparent fence, enclosing all four sides of his property. On the Cormanny road side, the road level was six feet higher than ground level at the property line. Buckley's fence at this point was placed on the property line and the top of the fence comes to the ground level of the road. A license was issued to Buckley by the county auditor.

On January 30, 1965, the county prosecutor filed an "Application" under Section 4737.11, Ohio Revised Code (Appendix G, page 54) to enjoin the operation of the Buckley junk yard and to have it abated as a nuisance. It was alleged that the six foot fence, newly erected by Buckley, was not of the specified height, and that it was unsightly and disorderly because it had vertical fence posts of varying lengths. Buckley, by answer and cross petition, impleaded the county auditor, sheriff and prosecutor, and attorney general of Ohio as new parties defendant. He filed a general denial, and by cross petition alleged that the statutes were unconstitutional under the Constitution of the United States, and the Constitution of Ohio. He further alleged that the statutes were based upon aesthetics and were an unconstitutional exercise of the police power, that they deprived him of property without due process of law, that the statutes were not capable of uniform application throughout the state of Ohio, and were arbitrary and unreasonable. He further alleged that the statutes failed to contain standards of guidance and unlawfully delegated legislative power, and were discriminatory in exempting scrap yards (as distinguished from auto wrecking yards) therefrom. Buckley asked the court, by Declaratory judgment, to find that the statutes are unconstitutional.

There was no testimony at the trial by the county auditor, nor sheriff, nor their representative. There was no evidence as to the mandatory inspections and written reports which the statutes required the sheriff to make twice annually.

The common pleas court ruled that the provision in the statute permitting the court to abate the junk yard as a nuisance for lack of a fence was vague and indefinite and unconstitutional. However, on the common law, equity jurisdiction of the court, it declared it to be a nuisance

and ordered the fence to be elevated by two additional feet on the rear (where there was no road), and on the Cormanny road side (where the road was elevated six feet higher than the property).

The trial court held that the statutes are not unconstitutional as being aesthetic in character and requiring the licensing of junk yards, but are unconstitutional as being vague and indefinite in the definition of fences, creating a legislative nuisance by the lack of same, and in the enforcement thereof. Further that the statutes are discriminatory and in many cases physically impossible of uniform enforcement. Further that the statutes are discriminatory in exempting scrap yards.

The Court of Appeals affirmed the trial court in part, and reversed in part, ruling in favor of constitutionality of the statutes.

(E) THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

Ohio Revised Code Sections 4737.05 through 4737.11 and 4737.99 (the statutes) are repugnant to the Constitution of the United States in that they are violative of the Fourteenth Amendment in depriving persons of property without due process of law, and in denying the equal protection of the laws.

The courts below each wrote an opinion, and a dissenting opinion was written in the Ohio Supreme Court (concurred in by the two dissenting justices). The trial court held that the statutes were constitutional in part, and unconstitutional in part. The Court of Appeals affirmed in part and reversed in part, holding in favor of constitutionality, but considering that a stronger question of impossibility of performance could present itself in a different case and suggesting that the test of obscurity in

that case "* * * is not from an ordinary view as required by the statute." Query: Does this not illustrate the justification of the trial court's holding that the statutes are unconstitutional as being vague and indefinite, in this as well as other respects stated by the trial court? The Supreme Court affirmed in favor of strict enforcement of the statutes, but two justices dissented. There is substantial difference of opinion among the judges who considered this case at its various stages.

In the leading Ohio case of *Youngstown v. Kahn Bros. Building Co.*, 112 Ohio State 654 (1927), Ohio had held that aesthetics are not a proper basis for the police power, and forcefully expressed its views:

> "* * * mere aesthetic considerations cannot justify the use of the police power * * * it is * * * not essential to the public need that our aesthetic desires be gratified * * * the public view as to what is necessary for aesthetic progress greatly varies * * * the aesthetic standard (is) impractical as a standard for use restriction upon property. * * * The world would be at continual seesaw if aesthetic considerations were permitted to govern the use of the police power. *We are, therefore, remitted to the proposition that the police power is based upon public necessity, and that the public health, morals or safety, and not merely aesthetic interest, must be in danger in order to justify its use.*"

This rule has been followed in Ohio, and was argued in this case. The majority opinion (Appendix A) does not follow *Youngstown v. Kahn,* nor does it reverse it. It ignores it and follows a tortuous course saying, "* * * aesthetic considerations can support these statutes * * * The legislation itself may be constitutional, but its application to a given set of facts may be unconstitutional where the purpose of the act—promotion of the general welfare—

would not be furthered, since then there would be no justification for interference with the use of private property * * *. *This holding is not to be construed as a blanket approval of regulation based upon aesthetics* * * *." The latter statement implying that only this statute is held to be constitutional although founded on aesthetic considerations. Thus the majority does not follow the other jurisdictions that it seemingly approves, and does not say that it will follow them in Ohio in future cases where aesthetics are a consideration. Particularly in view of the facts clearly found by the trial court this is an arbitrary and unreasonable holding, and violative of the Fourteenth Amendment.

Admittedly, there are cases contrary to the doctrine that aesthetics are not a proper basis for the exercise of the police power. But, whereas *Berman v. Parker,* 348 U. S. 26, 33, says that it is within the power of the legislature to determine that the community should be beautiful as well as healthy, *Berman* limits that power, by saying, "* * * *The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking* * * *." (36)

The Ohio Supreme Court in *Buckley* justifies its approval of aesthetics on the basis of the general welfare clause of the Ohio Constitution. Parenthetically, this clause was contained therein at the time of *Youngstown v. Kahn,* and adds nothing new. However, this Court has held that the general welfare alone is not sufficient justification, saying:

> "* * * It is true that police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals * * * *but when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition*

must bear some reasonable relation to the evils to be eradicated or the advantages to be secured."

Nashville v. Walters, 294 U. S. 405 (1934).

"* * * Statute may be reasonable and therefore valid at one time, and under one set of circumstances, yet unreasonable and therefore invalid under different circumstances * * *."

Nashville v. Walters.

Although the Ohio Supreme Court in *Buckley* says that the statutes may be unconstitutional in a situation where the general welfare would not be furthered, nevertheless, it is difficult to reconcile this with the categorical ruling that even *impossibility of performance* does not excuse violation of the statutes. After considering the Ohio Supreme Court's rejection of all arguments (particularly where the trial court found that Buckley is no more unsightly than his neighbors), it is difficult to conceive of a situation in which these statutes could be interterpreted by the Ohio Supreme Court as being unconstitutional in not furthering the general welfare.

The trial court recognized that in the hilly regions of southern and eastern Ohio it could be impossible to comply with the requirements of the statutes to obscure the junk yard. "A fence might have to be twenty, thirty and even forty feet high." (Appendix C) The statutes cannot be uniformly applied to all junk yards. The Court of Appeals said that a junk yard could be situated so that it could not be obscured—"* * * (that) state of facts (not present in this case) may be determined in another case to make it unconstitutional * * *." (Appendix B)

However, the Supreme Court of Ohio in a broad, sweeping opinion held:

"* * * We read the statutes in question as requiring that the fence effectively and substantially hide the cars in the junk yard from the public view contemplated by the statute. *No unevenness of terrain* which makes this difficult or *impossible excuses violation of the statutory requirement* * * *."

The dissenting opinion takes issue with this, saying:

"* * * Furthermore, where land otherwise worthless, made valuable by reason of the development of an industry in the collection and sale of junked automobiles, is destroyed by statute, it may be argued that the owners of such industry are entitled to compensation under the provisions of Section 19, Article I of the Constitution of Ohio * * *."[1]

If **impossibility of performance** by reason of terrain does not excuse violation of the statutes, it follows that the property cannot be used by the owner for the purpose of a junk yard.

"* * * Any regulation which deprives a person of a profitable use of his property constitutes a taking of property, and entitles him under the Constitution to compensation, unless the invasion of rights is so slight

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[1] Section 19, Article I of the Constitution of Ohio reads as follows and is analogous to the doctrine of the Fourteenth Amendment.

Constitution of Ohio, Article I, Section 19—*Inviolability of Private Property*:

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

as to permit the regulation to be justified under the police power."

Pumpelly v. Green Bay Co., 13 Wall. 166;
United States v. Lynah, 188 U. S. 445.

There is no provision in the Ohio Statutes for just compensation in the event that the property owner is denied the use of his property for this purpose. The denial of the right of use of property is a substantial one, and has been so recognized.[1]

The Ohio Supreme Court has held many times that the denial of the use of property deprives the owner of substantial property rights.

In *Mentor Lagoons, Inc. vs. Zoning Board of Appeals of Mentor Township* (1958), 168 Ohio State 113, the Ohio Supreme Court held that:

"Certainly, if appellant is not permitted to so use its land, that will be a 'hardship' upon appellant." Page 120.

In *Akron v. Chapman*, 160 Ohio State 382, the Ohio Supreme Court said:

"What is property? It has been defined as not merely the ownership and possession of lands or chattels but the unrestricted right of their use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use is denied, the value of the property is annihilated and ownership is rendered a barren right. See *Spann v. City of Dallas*, 111 Tex. 350, 235 S. W. 513, and *O'Connor vs. City of Moscow*, 69 Idaho, 37, 202 P. (2d), 401, 9 A.L.R. (2d), 1031."

* * *

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[1] Compare with Federal Highway Beautification Act of 1965, Title 23, United States Code, Section 136.

> "The right to continue to use one's property in a lawful business and in a manner which does not constitute a nuisance and which was lawful at the time it was acquired is within the protection of Section 1, Article XIV, Amendments, Constitution of the United States, and Section 16, Article I of the Ohio Constitution, which provide that no person shall be deprived of life, liberty *or property* without due process of law."

Arbitrary action and abuse of power falls within the condemnation of due process. If manifestly and unreasonably discriminatory, it falls within the condemnation of equal protection. *Memphis & C. R. Co. v. Pace,* 282 U. S. 241, 246.

The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably. *Nashville v. Walters,* 294 U. S. 405.

This Court has said that the "* * * judgment of a state court is not necessarily conclusive, but it is entitled to the greatest respect (nevertheless, it) will be interfered with where wrong * * *." *Welch v. Swasey,* 214 U. S. 91.

It is respectfully submitted that the rulings by the Ohio Supreme Court on the substantial questions presented here and particularly that even **impossibility** of compliance by reason of terrain does not excuse violation of the statutes are *wrong,* and this Court should interfere.

The trial court held that the statutes are unconstitutional as being vague and indefinite in the definition of fences, in creating legislative nuisances by the lack of same, and in their provisions for enforcement. Thereby, the statutes violate the Fourteenth Amendment. The problems are manifest. The reviewing courts dealt with them summarily. The statutes are vague and indefinite as to when a fence is required or how high it should be. Certainly, "high enough to obscure" lacks definiteness. Even a sympathetic trial court required additions to be

made to the rear fence which did not face upon *any* road (let alone a county, state, or township road that are the subject of the statutes). The authority in the statutes to abate the junk yard as a nuisance for violation of the statutes, can only mean for lack of a fence. Although decrying this, the trial court found a nuisance to exist on this basis. (Despite its finding that Buckley was no more unsightly than his neighbors.) The effect of the vague and indefinite references to enforcement is self evident from the facts showing that enforcement here was instituted by the county prosecutor in the face of the license being issued by the auditor and no testimony of inspections or reports by the sheriff. The attorney general was impleaded by Buckley. The vague and indefinite nature of the statutes, found unconstitutional by the trial court, invites the haphazard, arbitrary and unreasonable enforcement that resulted. This is multiplied by the variety of interpretations and enforcement actions that occurs in the eighty eight counties of Ohio, and the respective officials of each of them.

The statutes are not capable of uniform enforcement. They apply only to junk yards outside municipalities, they do not provide for impossibility of performance due to terrain (indeed, the Ohio Supreme Court says impossibility does not excuse non compliance). The vague and indefinite language invites lack of uniform enforcement. The disunity of action of the county auditor, sheriff, and prosecuting attorney, and the attorney general, in this case, illustrates the point.

The statutes are discriminatory in exempting scrap yards from their application (as distinguished from auto wrecking yards). The Supreme Court of Ohio speculates as to a difference in order to find a valid reason for the exemption. Actually, there is none. The legislature arbitrarily and unreasonably favored the scrap industry, and

the exemption is flagrant and patently discriminatory. There is no distinction of classification and it is very obvious that this is so. A scrap yard is as lovely or unlovely, as sightly or unsightly, as dirty or clean, its contents have the same beauty or lack of beauty as that of its sister auto wrecking yard. If anything the scrap yard is *more* objectionable. It is almost always larger, it uses bigger equipment, it is noisier, it creates more traffic, its operations are more extensive. The Supreme Court of Ohio did not get the information for its comments from the record, and it is misinformed as to its theories. A scrap yard does not hold less space, it does not alleviate eyesores (to any more or less degree than an auto wrecking yard) nor does it stimulate the removal of junk (any more or less than an auto wrecking yard). Obviously, in both cases the product is continuously coming in and going out. If anything, an auto wrecking yard serves a greater purpose to dispose of the large volume of automobiles that annually come to the end of their service. Since there is no distinction of classification, the distinction exempting scrap yards is artificial, arbitrary and fictitious. It is discriminatory and unconstitutional.

The statutes are unconstitutional in their application to the Buckley property. The road on the Cormanny road side is six feet higher than the property level. Buckley should not have to obscure his property from a passer by looking *down* at the property. There is no road at the rear of the property. The fence should not be required at all, let alone be extended. The trial court, which found as to the factual matters, stated that Buckley was no more unsightly than his neighbors. Why then, should Buckley be declared to be a nuisance?

In *Nectow v. Cambridge*, 277 U. S. 183, the plaintiff's land was districted in a residence district. The adjoining

lands were put to industrial and railroad purposes. The express finding of the Master is "that the health, safety, convenience and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question." The court said: "This finding * * * is determinative of the case."

In Buckley, the trial court found that he was no more unsightly than his neighbors. The steps ordered to "correct the nuisance" were to add to the fence on the rear (which does not face upon a road, and therefore does not come within the purview of the statutes), and upon the Cormanny Road side (where the road is elevated six feet above the property, and the passers by look *down* upon the property). If Buckley is no more unsightly than his neighbors (as the court found as trier of the facts) than how is the general welfare promoted by declaring Buckley to be a nuisance and ordering him to do more than his neighbors are ordered to do? Just as in *Nectow,* this finding should be determinative of the case. The statutes are certainly discriminatory as to the Buckley property, and they deny him due process and the equal protection of the laws. *Southern Railway v. Virginia,* 290 U. S. 190.

CONCLUSION.

The Ohio statutes are violative of the Fourteenth Amendment to the Constitution of the United States, and the jurisdiction of this Court should be sustained and the substantial questions presented be resolved.

Respectfully submitted,

MILTON H. WYNER,
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Counsel for Appellants.

APPENDIX A.

OPINION OF THE SUPREME COURT OF OHIO.

THE STATE OF OHIO, APPELLEE, v. BUCKLEY ET AL., D.B.A. BUCKLEY'S AUTO WRECKING, APPELLANTS; SAXBE, ATTORNEY GENERAL, APPELLEE, ET AL.

[Cite as State v. Buckley, 16 Ohio St. 2d 128.]

Junk yards—Outside a municipality—To be obscured from view—Sections 4737.05 and 4737.07, Revised Code—"Obscured" construed as "entirely hidden"—Six-foot fence inadequate, when.

1. Sections 4737.05 to 4737.99, Revised Code, which require junk yards outside of a municipality to be obscured from the ordinary view of persons passing upon state, county and township roads, are a valid exercise of the police power although they are based upon aesthetic considerations.

2. The statutory requirement, found in Sections 4737.05 and 4737.07, Revised Code, that junk be obscured from the ordinary view of persons passing upon state, county and township roads means that the junk must be entirely hidden from the view of such passers-by, and such requirement is neither vague nor uncertain, nor does it involve an unconstitutional delegation of legislative authority.

3. Legislation must apply alike to all persons within a class, and reasonable grounds must exist for making a distinction between those within and those without a designated class. Within the limits of those restrictive rules, a legislative body has a wide measure of discretion. (Paragraph two of the syllabus of *Porter v. Oberlin*, 1 Ohio St. 143, approved and followed.)

(No. 68-5—Decided December 31, 1968.)

APPEAL from the Court of Appeals for Summit County.

Charles E. and Robert E. Buckley, appellants herein, operate a junk yard (Buckley's Auto Wrecking) in Summit County. On January 30, 1965, the county prosecuting attorney filed an application in the Court of Common Pleas to abate the operation of this yard as a nusiance under Sections 4737.05 to 4737.99, Revised Code, hereinafter referred to as the junk-yard statutes.

The Buckleys cross-petitioned for a declaratory judgment to test the constitutionality of those statutes, and impleaded as new parties the county auditor, the sheriff and the Attorney General of Ohio.

The trial court held that those parts of the junk-yard statutes which define fences, which create a legislative nuisance where there are no fences, and which provide for enforcement are vague, indefinite, and unconstitutional. The court held also that the exemption of scrap processing dealers was unreasonably discriminatory.

Upon appeal, the Court of Appeals found the statutes constitutional and reversed that portion of the judgment of the trial court which held the junk-yard statutes unconstitutional in part. The cause is now before this court as an appeal involving a constitutional question and pursuant to the allowance of Buckleys' motion to certify the record.

Mr. James V. Barbuto, prosecuting attorney, and *Mr. William R. Moore, Jr.,* for plaintiff-appellee.

Messrs. Wyner & Wyner and *Mr. Milton H. Wyner,* for appellants.

Mr. William B. Saxbe, attorney general, and *Mr. Robert D. Macklin,* for defendant-appellee.

BROWN, J. The relevant provisions of Sections 4737.05 to 4737.99, Revised Code, provide as follows:

Section 4737.05. "As used in Sections 4737.05 to 4737.11, inclusive, of the Revised Code:

"* * *

"(B) 'Junk yard' means an establishment * * * other than an establishment having facilities for processing iron, steel, or non-ferrous scrap and whose principal product is scrap iron and steel or non-ferrous scrap for sale for remelting purposes, which is maintained or operated for the purpose of storing, keeping, buying, or selling junk, or for the maintenance or operation of an automobile graveyard * * *.

"(C) 'Fence' means an enclosure at least six feet in height, constructed of non-transparent material, and maintained so as to obscure the junk in the enclosure from the ordinary view of persons passing upon the state, county, and township roads in this state."

Section 4737.07. "No person shall operate and maintain a junk yard outside of a municipality without first obtaining a license to do so from the county auditor * * *. Any person operating or maintaining a junk yard within one thousand feet of a state or county road or within three hundred feet of a township road, prior to January 1, 1964, shall have one year thereafter to erect the required fence if such junk yard is not obscured by natural objects. * * *

"* * *

"Any license * * * issued under this section may be revoked by the county auditor * * * after reasonable notice and opportunity to be heard, for any violation of Sections 4737.01 to 4737.11, inclusive, of the Revised Code * * *."

Section 4737.10. "Twice annually the sheriff of each county shall inspect every junk yard that is located within his jurisdiction and for which a license

has been issued . . . to obtain information with regard to whether the licensee's business has been and is being conducted in accordance with Sections 4737.01 to 4737.11, inclusive, of the Revised Code. The sheriff shall submit a written report of each such examination to the county auditor of the county wherein such junk yard is located."

Section 4737.11. "Whenever the prosecuting attorney of any county or the Attorney General is of the opinion that a junk yard is being operated or maintained in violation of any of the provisions of Sections 4737.05 to 4737.11, inclusive, of the Revised Code, he may apply, in the name of the state, to a court of competent jurisdiction, alleging the violation complained of and praying for an injunction or other proper relief. In such a case the court may order such junk yard abated as a nuisance or make such other order as may be proper. * * *"

Section 4737.99. "(A) Whoever violates Sections 4737.01 to 4737.11, inclusive, of the Revised Code, shall be fined not less than twenty-five nor more than one thousand dollars and the costs of prosecution."

The appellants' auto wrecking business has been in operation since 1947. State, county, or township roads run directly beside the yard on three sides. Subsequent to the enactment in 1964 of the junk yard statutes, the appellants erected a six-foot fence around their entire yard. They thereafter received yearly licenses. The prosecuting attorney brought this action under statutory language requiring junk yards to be operated in accordance with the junk-yard statutes, which statutes authorize action for injunction, or other relief at any time when he is of the opinion that the junk-yard statutes are being violated.

The alleged violation involved both the stacking of junk cars, so that they extended above the six-foot fence

and were visible to persons on two of the highways involved, and the placing of junk cars in areas within the enclosure which were not effectively obscured by the fence because one of the highways was elevated above the junk-yard area.

The primary question here is whether aesthetic considerations may support such an exercise of the police power.

In *Ghaster Properties v. Preston,* 176 Ohio St. 425, which upheld statutes prohibiting certain types of highway billboards, Chief Justice Taft spoke for the court in deciding that the general welfare of the public includes more than public health, safety and morals, and that in drafting a statute the General Assembly could properly give weight "to its effect in promoting the comfort, convenience, and peace of mind of those who use the highway by removing annoying intrusions upon that use." In several other states junk-yard statutes similar to those now before us have been held constitutional, in spite of their obvious foundation on aesthetic considerations. See *Jasper v. Kentucky* (Ky.), 375 S. W. 2d 709, and *Farley v. Graney,* 146 W. Va. 22, 119 S. E. 2d 833. Concepts of police power change with the times, as pointed out by the following language from *Euclid v. Amber Realty Co.,* 272 U. S. 365, 387:

> "* * * Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and

> unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. * * *"

We think that aesthetic considerations can support these statutes, because interference with the natural aesthetics of the surrounding countryside caused by an unfenced or inadequately fenced junk yard is generally patent and gross, and not merely a matter of taste. Certainly the junk yard here, wherein junk cars are stacked so that they are visible many feet above the top of the fence, is patently offensive, and it cannot be effectively argued in this case that the statutes would be unconstitutional as applied, either because the offensiveness in this fact situation is only a matter of taste or because the surrounding area has no aesthetic value to preserve.

We do not hold that these counterarguments could not be persuasive on another set of facts. The legislative regulation of nuisance is in some ways analogous to zoning, as pointed out in *Euclid v. Amber Realty Co., supra*, and the determination in any particular case depends upon the facts of the case. The legislation itself may be constitutional, but its application to a given set of facts may be unconstitutional where the purpose of the act—promotion of the general welfare—would not be furthered, since then there would be no justification for interference with the use of private property. See *Euclid v. Amber Realty Co., supra; Nectow v. Cambridge*, 277 U. S. 183; and *Nebbia v. New York*, 291 U. S. 502, 525.

The connection between the general welfare and the need for regulation of the use of private property must be

subject to continuous review by the courts for the purpose of determining whether a limitation of use is justified; that is to say, whether the need for regulation in light of the general welfare has not yet ripened or has waned. In either event, any limitation on the use of private property would not be required by the public welfare, and hence would be unconstitutional. See *Nashville, C. & St. L. Ry., v. Walters,* 294 U. S. 405, 415; *Euclid v. Amber Realty Co., supra;* and 16 American Jurisprudence 2d 528, Constitutional Law, Section 272.

This holding is not to be construed as a blanket approval of all regulation based upon aesthetics.

Other jurisdictions have gone beyond our holding here and have held that it is within the power of the Legislature to determine that the community should be beautiful. *Berman v. Parker,* 348 U. S. 26, 33; *Oregon City v. Hartke,* 240 Ore. 35, 400 P. 2d 255. So large a step presupposes an exact definition of beauty which is acceptable to all tastes.

We read the statutes in question as requiring that the fence effectively and substantially hide the cars in the junk yard from the public view contemplated by the statute. No unevenness of terrain which makes this difficult or impossible excuses violation of the statutory requirement. The statutes are neither vague nor uncertain, nor do they contain an unconstitutional delegation of legislative power.

It is argued that the statutes are unconstitutional under the "equal protection" clauses of the Constitutions of the United States (Fourteenth Amendment) and of Ohio (Section 2, Article I) because there is no reasonable basis for exempting scrap yards from the class covered by the statutes.

As pointed out by Chief Justice Taft in *Porter v. Oberlin,* 1 Ohio St. 2d 143, 151, equal protection requires

that class legislation apply alike to all persons within a class, and that reasonable grounds exist for making a distinction between those within and those without a designated class. Within these limits a legislative body has a wide measure of discretion. *Xenia v. Schmidt,* 101 Ohio St. 437; *Benjamin v. Columbus,* 167 Ohio St. 103.

It is generally recognized that when a legislative body chooses to act to correct a given evil it need not correct all the evil at once, but it may proceed step-by-step. *Yee Bow v. Cleveland,* 99 Ohio St. 269; *Porter v. Oberlin, supra,* 152; *Xenia v. Schmidt, supra.*

Furthermore, as Justice Holmes said in *Central Lumber Co. v. South Dakota,* 226 U. S. 157, 160:

> "* * * If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law."

We think that the exemption of scrap yards is neither arbitrary nor unreasonable. Unlike junk yards, which are merely storehouses for junk cars, scrap yards consume the junk cars within their confines, and thus help to alleviate the eyesores of automobile graveyards dotting the countryside. Also, by consuming vehicles, a scrap yard occupies far less space than would a junk yard which stored the number of vehicles the scrap yard handles over a period of time. It may well be that the General Assembly saw fit to exempt scrap processing dealers to stimulate efforts to remove junk instead of store it. Certainly we can not say that junk yards are not a conspicuous example of modern roadside blight.

The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

TAFT, C. J., ZIMMERMAN, MATTHIAS and O'NEILL, JJ., concur.

HERBERT and SCHNEIDER, JJ., dissent.

HERBERT, J., dissenting. Section 1, Article I of the Ohio Constitution, in part, provides that:

> "All men * * * have certain inalienable rights, among which are those of * * * acquiring, possessing, and *protecting property* * * *." (Emphasis added.)

It is stated in the opinion that:

> "* * * No unevenness of terrain which makes this [concealment of a junkyard] difficult or *impossible* excuses violation of the statutory requirements. * * *" (Emphasis added.)

There are many areas in Ohio, particularly in the southern and eastern portions, in the hill country, where it would be impossible to have a junkyard which would comply with the requirements set up in the statutes here under consideration. In other parts of the state there are hundreds of miles of road built upon a grade. An occupant of an automobile on such a road could see over a fence six feet tall and observe, probably, some junked automobiles.

An unwarranted "sudden death" power is granted to the various county auditors to destroy a great and growing dual industry, *i.e.*, eliminating junked motor vehicles and creating a source of supply for remelting steel. I believe that these statutes invade the constitutional protection above quoted. Furthermore, the development of industrial parks adjacent to municipalities may well be endangered by the enforcement of these statutes, as interpreted by the majority opinion and judgment. This judgment is based solely on the claim that a junkyard in rural areas offends the sense of the aesthetic.

Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, at page 662 in the opinion, speaks in the words following:

> "* * * We are therefore remitted to the proposition that the police power is based upon *public necessity*, and that the *public health, morals, or safety, and not merely aesthetic interest, must be in danger in order to justify its use.*" (Emphasis added.)

Paragraph three of the syllabus in *Wondrak v. Kelley*, 129 Ohio St. 268, is as follows:

> "*Aesthetic reasons alone*, unrelated to the requirements of the public health, safety or welfare, will not justify the exercise of the police power." (Emphasis added.)

Chapter 4737.05, Revised Code, may tend to interfere with the free exercise of the initiative essential to private enterprise. There may well be healthful competition between scrap yards and junk yards. This legislation weighs heavily against the junk-yard industry, from which its competitor, the scrap-yard industry, is free.

Furthermore, where land otherwise worthless, made valuable by reason of the development of an industry in the collection and sale of junked automobiles, is destroyed by statute, it may be argued that the owners of such industry are entitled to compensation under the provisions of Section 19, Article I of the Constitution of Ohio.

APPENDIX B.

OPINION OF THE COURT OF APPEALS NINTH JUDICIAL DISTRICT.

BRENNEMAN, *P.J.*

The matter before this court is based upon an appeal on questions of law from an order of the court of Common Pleas of Summit County, by the defendant, the Attorney General of Ohio (appellant here), and the cross-appeal of the defendants, Charles E. and Robert E. Buckley, d.b.a. Buckley's Auto Wrecking (hereinafter referred to as "Buckley") in case numbered 5891; and an appeal on questions of law from the same order, by the defendants, Calvin L. Bower, Auditor, Robert D. Campbell, Sheriff, and James V. Barbuto, Prosecuting Attorney, of Summit County (appellants here), in case numbered 5893. The two cases were consolidated in this Court, and the opinion here expressed is determinative of each one.

The facts concerning the case in the trial court, including the pleadings there filed, are hereinafter set forth in their chronological order.

The Prosecuting Attorney of Summit County filed an application in the Court of Common Pleas of Summit County, as provided in Section 4737.11, Revised Code, against Buckley, in which application it was alleged, among other things, that: Buckley operated a "junk yard" in the city of Akron (1) "without a fence six feet in height constructed of non-transparent material, and maintained so as to obscure the junk in the enclosure from the ordinary view * * * in violation of Revised Code Section 4737.07;" (2) the existing fence enclosing the junk yard was constructed by "using vertical fence post of varying lengths * * * creating unsightly and disorderly construction * * * in violation of Revised Code Section 4737.09;"

and (3) "said junk yard is a nuisance and as a result of * * * (its) operation, the residents of the community have suffered irreparable harm."

Buckley filed an answer and cross-petition setting forth a general denial, and specifically denied that "their business is being operated in violation of the 'statutes' * * * and * * * is a nuisance."

Buckley alleges also, among other things, that: the business conducted by them is "exempt and excluded" from the so-called "junk yard" statutes (Ohio Revised Code Section 4737.05 to 4737.11, inclusive, and 4737.99, as amended); "Ohio Revised Code Sections 4737.05 to 4737.11, inclusive, and 4737.99, as amended, violate the Constitution of the state of Ohio and the Constitution of the United States of America;" "said section sections are based solely on aesthetic considerations and are an unconstitutional exercise of the police power and are void * * * arbitrary and unreasonable. Further * * * (they) constitute an unlawful delegation of legislative power," deprive them "of the use of their property," "are indefinite" and "not capable of interpretation and compliance;" and the licenses "required under said sections" are "required improperly" and are "invalid and contrary to law."

Buckley, by cross-petition, sought a judicial determination "as to the construction and validity of sections 4737.05 to section 4737.11, inclusive, and section 4737.99, as amended," and their rights thereunder, or, in the alternative, that the court declare that the "sections complained of * * * are void, unconstitutional and ineffective and without force of law," and permanently restrain and enjoin the plaintiff, and those in privity with the plaintiff, from the enforcement of said statutes.

After trial of the issues, the Court of Common Pleas made certain orders, which are, in pertinent part, as follows:

"* * * the court * * * finds:

"(1) That the defendants Buckley substantially complied with the statute, however, in the exercise of the court's common law equitable jurisdiction the court finds that in some respects a nuisance does exist. It is therefore ordered and adjudged that:

"(a) The fence along Manchester Road on each side of the building should be increased by a two foot (2′) steel panel similar to the existing fence.

"(b) The Cove Road fence is satisfactory.

"(c) The Cormanny Road existing fence should be raised to close to the ground level and then an additional two foot (2′) panel placed on top, increasing the height by two feet (2′).

"(d) The fence in the rear should be increased by a two foot (2′) panel.

"(e) All poles should then be cut level with the top of the fence.

"(f) Cars cannot be piled more than two (2) high.

"(g) No junked autos are to be left in the front on Manchester Road.

"(h) All the above to be accomplished within thirty (30) days of the date of this order.

"(2) That the statutes in question are not unconstitutional on the grounds of being purely aesthetic in character.

"(3) That the statutes in question are not unconstitutional in their requiring the licensing of 'junk yards.'

"(4) That part of Section 4737.05, Revised Code, et seq., dealing with (a) definition of fences, and (b) creating a legislative nuisance by the lack of same, and (c) providing enforcement, are vague, indefinite

and unenforceable and cannot be uniformly applied to all junkyards, and specifically exempts scrap processing dealers and thereby is discriminatory and, therefore unconstitutional, null and void.

"(5) That a writ of injunction be issued to the above entitled cause by the Clerk of this Court restraining and enjoining plaintiff and each and all of the following defendants herein, namely, Auditor of Summit County, Sheriff of Summit County, Prosecuting Attorney of Summit County, and Attorney General of Ohio, and their agents and servants and successors in office of and from exercising any of the rights, powers and duties as granted to or imposed upon them, or any of them, under the aforesaid statutes, insofar as said statutes purport to confer such rights, powers and duties upon them and each of them, and further restraining and enjoining them from prosecuting any alleged violation of said statutes by defendants Buckley, their agents and servants, and to the extent that any such action may be derived from the purported powers, rights and authorities vested in them by said statutes, from filing any complaint and obtaining the issuance of any process against defendants Buckley or in any manner from interfering with or attempting to interfere with defendants Buckley with respect to the said statutes.

"(6) That said writ of injunction issue without bond for good cause shown at trial before this Court."

For the purpose of clarity, all of the so-called "junkyard" statutes (Sections 4737.05 to 4737.11, inclusive, of the Revised Code), are hereinafter set forth in their entirety, or in their pertinent parts as they may be applicable to the issues.

Section 4737.05:

"As used in sections 4737.05 to 4737.11, inclusive, of the Revised Code:

"* * *

"(c) 'Fence' means an enclosure at least six feet in height, constructed of non-transparent material, and maintained so as to obscure the junk in the enclosure from the ordinary view of persons passing upon the state, county, and township roads in this state."

Section 4737.06:

"No person shall operate or maintain a junk yard outside a municipality unless he has first obtained a license issued under sections 4737.05 to 4737.11, inclusive, of the Revised Code.

"No licensee shall operate or maintain a junk yard in violation of the provisions of sections 4737.05 to 4737.11, of the Revised Code."

Section 4737.07 and 4737.08 of the Revised Code provide for the licensing of certain junk dealers, the fee therefor, and the renewal of the license.

Section 4737.09:

"Any fence constructed under sections 4737.05 to 4737.11, inclusive, of the Revised Code, shall be neatly constructed, shall be nontransparent, shall be kept in good order and repair, and no advertisement shall be permitted thereon other than the name of the person under whose name the license has been issued and the nature of the business conducted therein."

Section 4737.10:

"Twice annually the sheriff of each county shall inspect every junk yard that is located within his jurisdiction and for which a license has been issued under sections 4737.05 to 4737.11, inclusive, of the Revised Code, to obtain information with regard to whether the licensee's business has been and is being conducted in accordance with sections 4737.01 to 4737.11, inclusive, of the Revised Code. The sheriff shall submit a written report of each such examina-

tion to the county auditor of the county wherein such junk yard is located.

"The sheriff shall, for the purpose of this examination, have free access to the grounds and buildings used in the conduct of the junk yard business by the licensee.

"Such inspections may be made at any time, at the option of the sheriff, during regular work hours of the licensee or within the hours of eight a.m., and five p.m., Monday through Friday."

Section 4737.11:

"Whenever the prosecuting attorney of any county or the attorney general is of the opinion that a junk yard is being operated or maintained in violation of any of the provisions of sections 4737.05 to 4737.11, inclusive, of the Revised Code, he may apply, in the name of the state, to a court of competent jurisdiction, alleging the violation complained of and praying for an injunction or other proper relief. In such a case the court may order such junk yard abated as a nuisance or make such other order as may be proper. An action brought under this section shall not be deemed to be a bar to a prosecution under section 4737.99 of the Revised Code."

Section 4737.99 of the Revised Code is the penalty statute for violation of the foregoing sections.

The Attorney General of Ohio assigns two errors, saying that: the trial court erred (1) "in holding that that part of Section 4737.05, Revised Code, et seq., dealing with (a) definition of fences, and (b) creating a legislative nuisance by the lack of same, and (c) providing enforcement, are vague, indefinite and unenforceable and therefore unconstitutional, null and void;" and (2) "in holding the enforcement of the junk yard statutes to be discriminatory and in many cases physically impossible."

The cross-appellants, Buckley, assign five errors, saying that: the trial court erred (1) "in holding that the junk yard statutes are not unconstitutional on the grounds of being purely aesthetic in character; (2) "in holding that the junk yard statutes are not unconstitutional as *a* licensing statutes; (3) "in finding that in some respects a nuisance does exist:" (4) "the junk yard statutes are an unlawful delegation of legislative power," and (5) "the junkyard statute is unconstitutional in its application to * * * (Buckley's) property."

The appellant, James V. Barbuto, Prosecuting Attorney of Summit County, assigns one error, saying that: "the trial court erred in holding that part of Section 4737.05, Revised Code, et seq., dealing with (a) definition of fences, and (b) creating a legislative nuisance by the lack of same, and (c) providing enforcement, are vague, indefinite and unenforceable, cannot be uniformly applied, is discriminatory and therefore unconstitutional, null and void."

Buckley operates a typical automobile junk yard in the city of Akron. Its location is within a zoned commercial area, adjacent to a residential area. The topography of the land is such that, on one side, the land lies approximately six feet lower than the level of the sidewalk. There is ample credible evidence showing that: Buckley has constructed a fence, non-transparent in composition, and six feet in height; the vertical fence posts vary in height so as to make the posts protrude above the fence in an irregular fashion.

From the evidence, and the exhibits, it can easily be determined that: wrecked cars are clearly visible from the street and sidewalk; cars are piled on top of each other, and a pile is often three or four cars high; the contents of the junk yard are not obscured to passers-by,

either by natural means, or by means of the existing fence; cars are visible above the top limits of the existing fence from various sides of the yard, and this visibility applies to several sides of the yard, other than the side where the sidewalk is level with the top of the fence.

The language used in the statute dealing with the definition of fences (Section 4737.05, Revised Code), is plain and, we believe, capable of ordinary interpretation. It requires a fence that obscures from view the contents of the area which it encloses. The fence must be at least six feet in height, and more than six feet in height if such additional height is necessary to attain the obscurity from view required by the statute. Attaining obscurity is the final test as to the required height of the fence.

We do not deem it necessary to report here the meaning of "non-transparent" as used in the statute. We believe its meaning is self-evident. In arriving at this conclusion, we have followed the rules set forth in the case of *Eastman v. State,* 131 Ohio St. 1 (paragraphs 4 and 5 of the syllabus).

The trial court determined that the statute, in its definition of fences, fails to state what side or sides of the property used as a junk yard are to be enclosed, and, in essence, is vague because of the lack of such statement. If the test of obscurity is applied, a practical construction of the language means "any or all sides," if necessary to attain obscurity from ordinary view. We hold this determination to be a fair and reasonable construction, and in conformity with the general object of the statute. See: *Mutual Building & Investment Co. v. Efros,* 152 Ohio St. 369.

The trial court determined that the issuing of a license by the county auditor (Section 4737.07, Revised Code); the inspection by the county sheriff (Section

4739.10, Revised Code); and the powers granted the prosecuting attorney, and the attorney general, for enforcement (Section 4737.11, Revised Code), are a grant of power to all four officers to determine what is "ordinary view" as contained in Section 4737.05, Revised Code. With this, we do not agree. Enforcement procedures are provided for failure of compliance, and remedial procedures in the courts are provided for enforcement, as well as remedial procedures against the abuse of the enforcement provisions of the statutes. The enforcement and remedial procedures encompass relief to all parties. We determine that such statutes do not deny the due process of law by an unlawful delegation of power, and are not a denial of the judicial process.

As to the second error assigned by the Attorney General of Ohio, and a similar error assigned by the Prosecuting Attorney of Summit County; we hold that portion of the trial court's judgment directed to discrimination to be untenable. The failure of legislation to cover an entire field of similar abuses does not invalidate that legislation as discriminatory. See: *Grown v. City of Cleveland,* 125 Ohio St. 455; and *City of Xenia v. Schmidt,* 101 Ohio St. 437 (paragraph 9 of the syllabus).

As to the physical impossibility of performance, we can agree that some difficulty may, under certain unusual circumstances, make performance in one instance more difficult to attain than in other circumstances. (One example is where the operator of a junk yard piles cars three or four high, as distinguished from those who refrain from such practice.) Obscurity, as required by the statute, may be as difficult in this case as the operator of the junk yard, by his deliberate conduct, makes it. In only the most unusual circumstances do we find the requirement of obscurity impossible of performance. We refer to an instance

where, conceivably, a junk yard may be located on the side of a hill, so as to make it observable to one approaching the hill from some distance away. In that unusual circumstance, the test of obscurity is not from an "ordinary view" as required by the statute. We cannot determine the statute to be unconstitutional as "discriminatory," or impossible of performance, simply because a state of facts (not present in this case) may be determined in another case to make it unconstitutional. See: *State, ex rel. Herbert vs. Ferguson, Auditor,* 142 Ohio St. 496.

The trial court, in consideration of the claims of Buckley, determined that the "junk yard" statutes were not "unconstitutional on the grounds of being purely aesthetic in character."

Section 19 of Article I of the Ohio Constitution provides, in part:

> "Private property shall ever be held inviolate *but subservient to the public welfare.*" (Italics ours.)

The general welfare of the public is the basis upon which the use of police power ordinarily rests. The constitutionality of a regulatory statute which provides that a particular use of land shall be unlawful, or a nuisance, depends upon whether the regulation of such use comes within the police power. It is unnecessary to cite the long line of authorities for this proposition. (The case of *Chaster Properties, Inc. v. Preston, Director of Highways,* 176 Ohio St. 425, in a most recent and prominent authority, together with the line of cases there cited.)

The suppression of that which is offensive to the general public by the exercise of the police power is ordinarily not an unreasonable exercise of that power.

Automobile junk yards have spread the length and breadth of the land. The necessity for junk yards is appar-

ent, in order that the by-product of the use of a motor vehicle may be disposed of. The offensiveness of unregulated disposal yards is equally apparent. Between these two extremes, we determine that the regulation of such junk yards is a public necessity, to relieve the offensive presence of this disposable material.

We find that the statutory regulation of automobile junk yards, requiring a fence so as to obtain obscurity from "the ordinary view of persons passing upon the state, county, and township roads," is a reasonable exercise of the police power. The trial court properly determined that purely aesthetic grounds are sufficient for the exercise of that power. The "junk yard" statutes, as herein challenged, are not unconstitutional.

Buckley asserts that the trial court erred in failing to hold the "junk yard" statutes unconstitutional as licensing statutes. We reject this claimed error for the reasons hereinbefore set forth.

Buckley insists the trial court erred in "finding that in some respects a nuisance does exist." We have carefully reviewed the record, and the exhibits. Buckley does not maintain an orderly yard. Cars are piled one upon another, contributing to the offensive view thereby created; and some cars are outside the fence. We conclude that the trial court had more than sufficient evidence upon which to predicate its finding of a nuisance, and its orders in this respect were reasonable and just, under the circumstances created by Buckley.

We cannot determine that the "junk yard" statutes are an unlawful delegation of legislative power. The statutes in question confer authority as to the execution of the law. We find no delegation of legislative power to the sheriff, auditor, prosecuting attorney, or to the attorney general, contained in these statutes.

The assertion that the "junk yard" statutes are unconstitutional in their application to Buckley's property is not tenable.

It is argued that the fence necessary to obtain obscurity from view would have to be so high as to make its construction impracticable to withstand the forces of wind, and the elements. This is not shown by the record, unless such height is made necessary because of the height that Buckley attains by piling junk cars one on top of another. This excessive piling is apparent from the record before us.

In summation, we find as follows:

1. The judgment of the trial court which found that that part of Section 4737.05, Revised Code, as it pertains to "(a) definition of fences, and (b) creating a legislative nuisance by the lack of same, and (c) providing enforcement" is "unconstitutional, null and void," is reversed.

2. The writ of injunction ordered in paragraph 5 of the order of the trial court must be dissolved and held for naught.

3. In all other respect, the judgment of the trial court is affirmed.

A journal entry in accordance with this opinion shall be prepared and submitted to this court, reversing, in part, and affirming, in part, the judgment of the trial court.

Judgment reversed in part, and affirmed in part.

HUNSICKER, J., and DOYLE, J., concur.

APPENDIX C.

DECISION OF COURT OF COMMON PLEAS.

(August 29th, 1966.)

In considering the Constitutionality of Section 4737.05 et seq., it might be helpful to review the prior proceedings in this case.

The petition, or application, was filed on January 20th, 1965 by the Prosecuting Attorney of Summit County. An answer and cross petition of the defendant made several new parties defendant. The Prosecuting Attorney was assisted in this case by counsel from the Office of the Attorney General. The petition apparently was filed as a result of complaints by residential property owners in the area. There was no question but what the defendant came within the purview of the instant statute and, in fact, he had a junk dealer's license as required by Section 4737.07 and had erected a six foot corrugated metal fence around all four sides of his junk yard at the time of the first hearing. Apparently, the Auditor thought the yard was obscured according to the statutory definition for he issued a license under .07 which states in part, "if the yard is so obscured, the person operating or maintaining it shall be entitled to a license." The Sheriff of Summit County, under Section 4737.10, apparently was under the opinion that the fence was satisfactory for he did not make any report to the Auditor that was adverse to the defendant. The complaint in the petition was that this fence was of insufficient height under R.C. 4737.05 (C) to obscure the junk and, further, that the business was otherwise operating in such a manner as to constitute a nuisance and requested the Court to order certain changes in the fence of the defendants and to abate the defendant's business as a nuisance. The cross petition of the defendants alleged

first of all compliance with the statute and, also, asked the Court to declare the instant statute unconstitutional.

The Court, after a hearing in which testimony was taken, found that the defendant had substantially complied with the statute but that in some respects a nuisance did exist and the Court at that time made certain orders concerning the same. Also, at the time the Court felt the additional issue of constitutionality was moot, since the Court order was on the basis of its common law equitable jurisdiction which was invoked by the plaintiff's petition.

The defendant now, however, has requested a ruling on the constitutional issue and the plaintiff apparently concurs that the constitutionality of this statute should be established, as undoubtedly this question will arise several times if there is an attempted enforcement of this "Sargus Bill" or "Junk yard fence statute."

Before considering the specific grounds alleged by the defendant, it might be well to consider the general nature of the defendant's business. The operation of "automobile salvage yards" or "junk yards" is a legitimate business and one necessary to modern society. Every year thousands of automobiles are abandoned or wrecked. If there were no place to deposit these "junkers," they would be dotting the landscape everywhere. In addition, these salvage yards make it possible for people with older automobiles to purchase parts that are not available elsewhere. These junk yards generally are of the type of business that require considerable *low cost* land upon which to deposit wrecked automobiles. Therefore, it is common to see salvage or junk yards located in land depressions or upon hillsides where the land would not be suitable for use by other types of business.

Also, I think it is obvious that the operation of such a business constitutes no per se hazard to the safety,

health or welfare of the general public. Naturally, any business, whether a junk yard or a rendering plant or a manufacturing plant, may be operated in such a way as to constitute a nuisance or danger to the public health or welfare. The Courts have always been open for any complaining party in this regard. Therefore, in the opinion of this writer, that part of Section 4737.11 which states "the Court may order the junk yard abated as a nuisance or make such other order as may be proper," adds nothing to the common law equitable jurisdiction of the Court to abate a nuisance. However since R.C. 4737.05 et seq. deals in part with the erection of fences, I presume the nuisance referred to would be that created by the lack of or improper fence. Therefore, relating back to the definition of a fence, in .05 the legislature has created a statutory nuisance if: (a) the fence is less than six feet high or, even if more than six feet high, it does not obscure the junked cars from the ordinary view of persons passing upon the state, county and township roads in the state. There is, also a part of .07 which indicates that a fence is not necessary if the yard is obscured by natural objects. The statute does not state whether this definition means a fence in front or on four sides of the property. Many junk yards can be seen while approaching the yard even though there is a fence in front. Now, the definition of ordinary view in the first instances is left to the County Auditor in .07 in conjunction with his issuing a license. In the second instance this ordinary view is determined by the Sheriff, who is to inspect all junk yards twice annually and report to the Auditor. In the third instance the County Prosecutor or Attorney General may define an ordinary view and are given authority to file action in the name of the State if, in their opinion, the fence is insufficient in height or does not obscure the view as defined. Therefore, the Leg-

islature has taken the historical judicial determination of nuisances in this respect from the Courts and given it to three other branches of County government. The possibility of enforcement problems is obvious.

In the instant case the property owner has roads on three sides of his property and residential houses in the rear. He was, therefore, required to fence all four sides of his property. This he did, with a substantial six foot corrugated steel fence. This apparently satisfied the Auditor as the defendant received his license. It apparently satisfied the Sheriff in his report (if any) to the Auditor. Therefore, this case arose by virtue of .11 when the County Prosecutor, because of complaints of residents, became of the opinion that the defendant had not complied with the statute. Now this Court previously ordered an additional two foot of fence in this case put on part of the property. The Court did this, however, as a part of its equitable jurisdiction in order to remove the unsightliness of the yard from the view of the residents in the rear more than to passers-by as this yard in front is no more unsightly than several other commercial enterprises in the area. The question arises as to what will happen to many other junk yards within the personal knowledge of this Court where the junked cars are on the side of a steep hill or in some cases in a deep depression. The fence required to comply with this statute would have to be twenty, thirty and even forty feet high.

Let me digress for the moment and return to the substantial purpose of the statute. The ostensible purpose is to require the licensing of junk yard operations. With this purpose the Court finds no fault. Junk yards are regulated in other parts of the Code by requiring certain written reports on property purchased, see R.C. 715.61 and R.C. 4737.01 through .04. A junk yard, like a pawn shop,

needs some supervision in this respect and the requiring of a license is certainly no unlawful interference with private property rights. The substantial purpose of the statute in question, however, is in keeping with the modern legislative trend to create more sightly conditions along our public highways. The more recent trend of cases hold in essence that aesthetic considerations are a proper exercise of police power (see answer brief of plaintiff for citations). However, in recent years this has been mainly accomplished through the passage of comprehensive zoning ordinances. Thus, the establishment of new junk yards can easily be relegated to secondary roads or in little traveled areas. Therefore, the instant "junk yard fence law" primarily affects junk yards that have been in existence for some years. Whether a junk yard constitutes a nuisance in its operation, either through its unsightliness, odor, noise, etc., is a matter that can best be determined by the Courts in each individual case. This attempted statutory declaration of nuisance is vague and indefinite, especially in the attempted manner of enforcing the same. I am, also, of the opinion that it cannot be uniformly applied to all junk yards. The fact that it specifically exempts scrap processing dealers is discriminatory and defeats the purpose of the bill, as these yards are just as unsightly as junk yards and often create much more noise and odors.

There are only two cases in Ohio which have come to this Court's attention that consider the instant legislation.

One is entitled *Henry Stanziano, et al., dba Commercial Auto Wrecking Company vs. State of Ohio, et al.*, Case No. 69163 in the Common Pleas Court of Lorain County. The other is the *State of Ohio, ex rel. C. Howard Johnson, Prosecuting Attorney of Franklin County, Ohio vs. O. R. Truitt*, Case No. 80113 in the Court of Appeals

of Franklin County, Ohio. These are both 1966 cases and this Court is unaware whether they have, at this time, been officially reported.

In neither of these cases was the precise issue raised that is before this Court. In the *Stanziano* case, the plaintiff asked for declaratory judgment claiming that it was exempt from the operation of the act, but apparently, also, contending that if not exempt, the act was unconstitutional. The bulk of the Court's decision in that case related to the issue of the exemption claimed by the plaintiff. After finding the plaintiff not exempt, the Court considered the constitutionality of the act only in the following paragraph:

"The Court after a complete review of the entire statute noting its language, intent, and requirements and all possible results therefrom if it is completely enforced by the authorities, feels that it is not unconstitutional as it certainly would apply equally to all people situated in the position of the plaintiffs, and has the proper view towards alleviating the situation that it so intends to alleviate."

The *Truitt* case is somewhat similar. The plaintiff in this case, the Prosecuting Attorney, claimed the defendant was operating a junk yard without a license. He, also, alleged that it was being operated as a nuisance. The defendant maintained that he was in the second hand automobile business and that the licensing statute was unconstitutional. The Court of Appeals cited the case of *Ghaster vs. Preston, Director of Highways,* in 27 O.O. 2d, 388, and held that the licensing statute was constitutional. It, also, found that the record indicated that a nuisance had been shown. The *Ghaster* case involved the removal of sign boards from the proximity of interstate freeways. The Supreme Court held that an owner's right to use his land may be restricted by the Legislature and the Legislature may declare a certain use illegal.

The power of the Legislature as indicated in the *Ghaster* case may not be in question, but the exercise of such power may depend upon the individual statute in any given case. This doctrine in the *Ghaster* case, while probably applicable to the *Truitt* case, does not apply to the instant issue. The decision of the Court of Appeals in the *Truitt* case was directed to two points, i.e., (1) the necessity of his obtaining a license, and (2) the existence of an apparently common law nuisance.

It is, therefore, the opinion of this Court as follows:

(1) That the statutes in question are not unconstitutional on the ground of being purely aesthetic in character.

(2) The statutes are not unconstitutional in their requiring the licensing of "junk yards."

(3) That part of 4737.05 et seq. dealing with (a) the definition of fences, and (b) creating a legislative nuisance by the lack of same, and (c) providing enforcement, are vague and indefinite and, therefore, unconstitutional. Also, I believe the enforcement of the same to be necessarily discriminatory under these statutes and, in many cases, physically impossible. The recent trend of legislative bodies (being obviously rather mutable) and even some Courts to delve into every facet of sociological, moral and ethical problems of the general public is very unwise. The liberty of the individual, which we all profess to cherish, is being "nibbled" away by legislative fiat and judicial acquiescence. I do not believe, however, that the balance of the constitutional grounds questioned by the defendant have any merit.

A journal entry may be prepared accordingly.

T. W. MITCHELL, *Judge*
(by Assignment)

APPENDIX D.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS.

This cause came on for trial on the application of the plaintiff, State of Ohio, by James V. Barbuto, Prosecuting Attorney of Summit County, Ohio, to enjoin the operation of defendant's junk yard, to wit, Charles E. and Robert E. Buckley, d.b.a. Buckley's Auto Wrecking, at 2977 Manchester Road, Akron, Ohio, and to have said junk yard abated as a nuisance, and on the answer and cross petition of defendants Buckley for declaratory judgment to determine the construction and validity of Sections 4737.05 to 4737.11 inclusive and Section 4737.99, as amended, of the Ohio Revised Code; and upon the pleadings and evidence of the parties with briefs of counsel having been submitted to the court, the court, upon consideration thereof, finds:

(1) That the defendants Buckley substantially complied with the statute, however, in the exercise of the court's common law equitable jurisdiction the court finds that in some respects a nuisance does exist. It is therefore ordered and adjudged that:

(a) The fence along Manchester Road on each side of the building should be increased by a two foot (2′) steel panel similar to the existing fence.

(b) The Cove Road fence is satisfactory.

(c) The Cormanny Road existing fence should be raised to close to the ground level and then an additional two foot (2′) panel placed on top, increasing the height by two feet (2′).

(d) The fence in the rear should be increased by a two foot (2′) panel.

(e) All poles should then be cut level with the top of the fence.

(f) Cars cannot be piled more than two (2) high.

(g) No junked autos are to be left in the front on Manchester Road.

(h) All the above to be accomplished within thirty (30) days of the date of this order.

(2) That the statutes in question are not unconstitutional on the grounds of being purely aesthetic in character.

(3) That the statutes in question are not unconstitutional in their requiring the licensing of "junk yards."

(4) That part of Section 4737.05, Revised Code, et seq. dealing with (a) definition of fences, and (b) creating a legislative nuisance by the lack of same, and (c) providing enforcement, are vague, indefinite and unenforceable and cannot be uniformly applied to all junkyards, and specifically exempts scrap processing dealers and thereby is discriminatory and, therefore unconstitutional, null and void.

(5) That a writ of injunction be issued to the above entitled cause by the Clerk of this Court restraining and enjoining plaintiff and each and all of the following defendants herein, namely, Auditor of Summit County, Sheriff of Summit County, Prosecuting Attorney of Summit County, and Attorney General of Ohio, and their agents and servants and successors in office of and from exercising any of the rights, powers and duties as granted to or imposed upon them, or any of them, under the aforesaid statutes, insofar as said statutes purport to confer such rights, powers and duties upon them and each of them, and further restraining and enjoining them from prosecuting any alleged violation of said statutes by defendants Buckley, their agents and servants, and to the extent that any such action may be derived from the purported powers, rights and authorities vested in them by

said statutes, from filing any complaint and obtaining the issuance of any process against defendants Buckley or in any manner from interfering with or attempting to interfere with defendants Buckley with respect to the said statutes.

(6) That said writ of injunction issue without bond for good cause shown at trial before this court.

Exceptions reserved to all parties.

APPENDIX E.

JOURNAL ENTRY OF THE COURT OF APPEALS.

(Filed November 22, 1967.)

This cause came on for hearing upon an appeal on questions of law from an order of the Court of Common Pleas of Summit County, by the defendant, the Attorney General of Ohio (appellant herein), and the cross-appeal of the defendants, Charles E. and Robert E. Buckley, doing business as Buckley's Auto Wrecking, in case number 5891; and upon appeal on questions of law from the same order by the defendants, Calvin L. Bower, Auditor of Summit County, Robert D. Campbell, Sheriff of Summit County, and James V. Barbuto, Prosecuting Attorney of Summit County (appellants herein), in case number 5893. The two cases having been consolidated by this court, this journal entry is determinative of each one.

On consideration of the bill of exceptions and assignments of error in these appeals on questions of law, and of the cross-appeal on questions of law, together with briefs and arguments of counsel, the court finds as follows:

1. The judgment of the trial court which found that part of Section 4737.05 of the Ohio Revised Code, as it pertains to "(a) definition of fences, and (b) creating a legislative nuisance by lack of same, and (c) providing enforcement" is "unconstitutional, null and void," is reversed.

2. The writ of injunction ordered in paragraph 5 of the order of the trial court is dissolved and held for naught.

3. The trial court had more than sufficient evidence to predicate its finding of a nuisance and its orders in this respect were reasonable and just. The stay of proceedings granted by the trial court as to its order set forth in paragraph 1, items (a) through (h) inclusive shall cease to operate.

4. The judgment of the trial court that Sections 4737.05 to 4737.11, inclusive, and Section 4737.99, as amended, of the Ohio Revised Code, are not unconstitutional on the grounds of being purely aesthetic in character, is affirmed.

5. The judgment of the trial court that Sections 4737.05 to 4737.11, inclusive, and Section 4737.99, as amended, of the Ohio Revised Code, are not unconstitutional in their requiring the licensing of "junk yards," is affirmed.

6. Sections 4737.05 to 4737.11, inclusive and Section 4737.99, as amended, of the Ohio Revised Code do not constitute an unlawful delegation of legislative power to the sheriff, auditor, prosecuting attorney, or to the Attorney General.

7. Sections 4737.05 to 4737.11, inclusive, and Section 4737.99, as amended of the Ohio Revised Code are not

unconstitutional in their application to the property of defendant-appellees and cross-appellants Buckley.

Costs to defendant-appellees, cross-appellants, Buckley.

Exceptions to defendant-appellees, cross-appellants, Buckley.

APPENDIX F.

JUDGMENT OF THE SUPREME COURT OF OHIO.

(December 31, 1968.)

This cause, here on appeal from the Court of Appeals for Summit County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; for the reasons set forth in the opinion rendered herein; and it appearing that there were reasonable grounds for this appeal it, is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Common Pleas Court to carry this judgment into execution.

APPENDIX G.

STATUTES.

Section 4737.05, Ohio Revised Code:

"As used in sections 4737.05 to 4737.11, inclusive, of the Revised Code:

"(A) 'Junk' means old or scrap copper, brass, rope, rags, batteries, paper, rubber, junked, dismantled, or wrecked automobiles or parts thereof, iron, steel, and other old or scrap ferrous or non-ferrous materials which

are not held for sale for remelting purposes by an establishment having facilities for processing such materials.

"(B) 'Junk yard' means an establishment or place of business, other than an establishment having facilities for processing iron, steel, or non-ferrous scrap and whose principal product is scrap iron and steel or non-ferrous scrap for sale for remelting purposes, which is maintained or operated for the purpose of storing, keeping, buying, or selling junk, or for the maintenance or operation of an automobile graveyard, except an establishment or place where automobiles, wrecked or otherwise, are held or impounded for a period not to exceed ninety days exclusively for storage, repair, or resale without alteration.

"(C) 'Fence' means an enclosure at least six feet in height, constructed of non-transparent material, and maintained so as to obscure the junk in the enclosure from the ordinary view of persons passing upon the state, county, and township roads in this state.

Section 4737.06, Ohio Revised Code:

"No person shall operate or maintain a junk yard outside a municipality unless he has first obtained a license issued under sections 4737.05 to 4737.11, inclusive of the Revised Code.

"No licensee shall operate or maintain a junk yard in violation of the provisions of sections 4737.05 to 4737.11, inclusive, of the Revised Code."

Section 4737.07, Ohio Revised Code:

"No person shall operate and maintain a junk yard outside of a municipality without first obtaining a license to do so from the county auditor of the county in which such junk yard is located or in which such junk

yard is to be established. A person who was operating or maintaining a junk yard prior to January 1, 1964 is entitled to be issued a license or renewal thereof upon payment of the fee provided for in this section. Any person operating or maintaining a junk yard within one thousand feet of a state or county road or within three hundred feet of a township road, prior to January 1, 1964, shall have one year thereafter to erect the required fence if such junk yard is not obscured by natural objects. If, after January 1, 1964, a junk yard is established within one thousand feet of a state or county highway or within three hundred feet of a township road, it must be so located that the view thereof from such road is obscured by natural objects or a fence. If the yard is so obscured, the person operating or maintaining it shall be entitled to a license.

"The fee for a license under this section is twenty-five dollars. All licenses issued under this section shall expire on the first day of January following the date of issue. A license may be renewed from year to year upon paying the auditor of the county in which the junk yard is located the sum of ten dollars for each such renewal.

"All fees paid under this section are for the use of the county which issues the license or renewal thereof.

"Any license or renewal thereof issued under this section may be revoked by the county auditor of the county in which the licensee's junk yard is located, after reasonable notice and opportunity to be heard, for any violation of sections 4737.01 to 4737.11, inclusive of the Revised Code, by the licensee or by any of his officers, agents, or employees. Whenever a license has been revoked under this section, the county auditor shall not issue another license to such licensee, to the husband or wife of such licensee, or to any partnership or corporation of which he

is an officer or member, until the expiration of at least one year from the date of revocation of such license."

Section 4737.08, Ohio Revised Code:

"Application for a license to operate and maintain a junk yard or for a renewal thereof shall be made in writing, accompanied by the proper fee, to the county auditor of the county in which the junk yard is located or in which it is to be established, setting forth the name and address of the applicant, the location of the junk yard, if the applicant is a firm, partnership, or association, the names and addresses of each member, if the applicant is a corporation, the date and place of incorporation and the names and addresses of its officers and directors, and such other reasonable information as the county auditor deems necessary. The application shall be signed and sworn to by the applicant."

Section 4737.09, Ohio Revised Code:

"Any fence constructed under sections 4737.05 to 4737.11, inclusive, of the Revised Code, shall be neatly constructed, shall be non-transparent, shall be kept in good order and repair, and no advertisement shall be permitted thereon other than the name of the person under whose name the license has been issued and the nature of the business conducted therein."

Section 4731.10, Ohio Revised Code:

"Twice annually the Sheriff of each county shall inspect every junk yard that is located within his jurisdiction and for which a license has been issued under sections 4737.05 to 4737.11, inclusive, of the Revised Code, to obtain information with regard to whether the licensee's business has been and is being conducted in accordance

with sections 4737.01 to 4737.11, inclusive, of the Revised Code, The Sheriff shall submit a written report of each such examination to the County Auditor wherein such junk yard is located.

"The Sheriff shall, for the purpose of this examination, have free access to the grounds and buildings used in the conduct of the junk yard business by the licensee.

"Such inspections may be made at any time, at the option of the sheriff, during the regular work hours of the licensee or within the hours of eight a.m. and five p.m. Monday through Friday."

Section 4737.11, Ohio Revised Code:

"Whenever the prosecuting attorney of any county or the attorney general is of the opinion that a junk yard is being operated or maintained in violation of any of the provisions of sections 4737.05 to 4737.11, inclusive, of the Revised Code, he may apply, in the name of the state, to a court of competent jurisdiction, alleging the violation complained of and praying for an injunction or other proper relief. In such a case, the court may order such junk yard abated as a nuisance or make such other order as may be proper. An action brought under this section shall not be deemed to be a bar to a prosecution under section 4737.99 of the Revised Code."

Section 4737.99, Ohio Revised Code:

"(A) Whoever violates sections 4737.01 to 4737.11, inclusive, of the Revised Code, shall be fined not less than twenty-five nor more than one thousand dollars and the costs of prosecution."

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In the
Supreme Court of the United States

October Term, 1968

No. 1209

On Appeal From the Supreme Court of Ohio

STATE OF OHIO, BY JAMES V. BARBUTO,
Appellees,

vs.

CHARLES E. AND ROBERT E. BUCKLEY,
dba BUCKLEY'S AUTO WRECKING,
Appellants.

MOTION TO DISMISS OR AFFIRM

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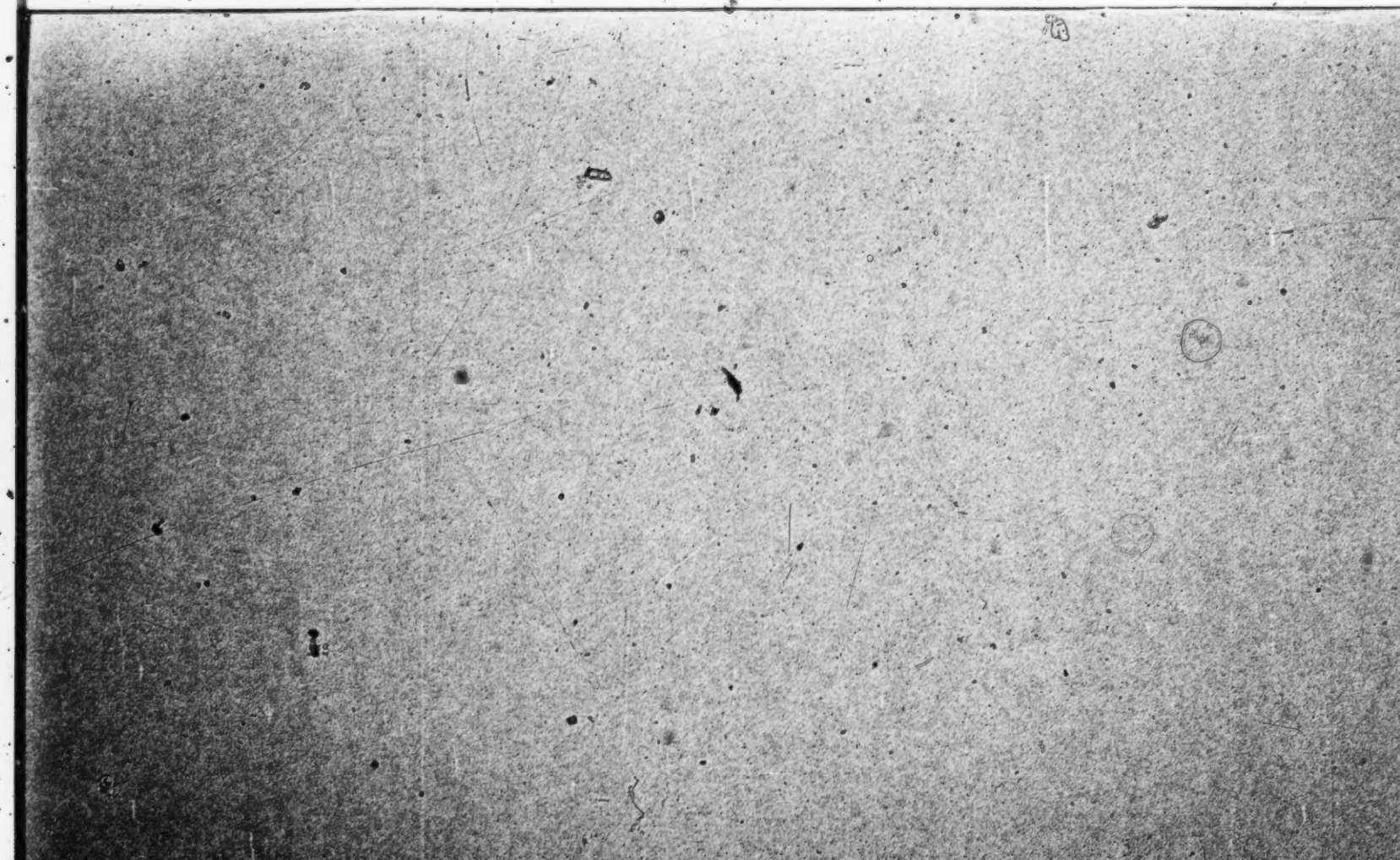

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In the

Supreme Court of the United States

October Term, 1968

No. 1209

STATE OF OHIO, BY JAMES V. BARBUTO,
Appellees,

vs.

CHARLES E. AND ROBERT E. BUCKLEY,
dba BUCKLEY'S AUTO WRECKING,
Appellants.

Appeal From The Supreme Court of Ohio

MOTION TO DISMISS OR AFFIRM

Paul W. Brown, Attorney General of Ohio, and successor in office to William B. Saxbe, appellee in this case, respectfully moves this Court, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, to dismiss this appeal on the ground that it does not present a substantial federal question and that the judgment rests on an adequate non-federal basis, or, in the alternative, to affirm the judgment of the Supreme Court of Ohio on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

On January 30, 1965, James V. Barbuto, Prosecuting Attorney of Summit County filed an application under Section 4737.11, Ohio Revised Code, in the Court of Common Pleas of Summit County to enjoin the named defendants, Charles E. and Robert E. Buckley, doing business as Buckley's Auto Wrecking, from further operation of their junk yard located at 2977 Manchester Road, Akron, Ohio, and to have said junk yard abated as a nuisance.

The application alleged facts to bring the operation of the junk yard within the junk yard licensing statutes, Sections 4737.05 to 4737.11, inclusive, and Section 4737.99 of the Ohio Revised Code. It was also alleged that the junk yard was being operated in violation of Section 4737.07, Revised Code, in that it was being operated without a fence of the specified height and construction and maintained so as to obscure the junk in the enclosure from the ordinary view of persons passing upon the road. It was further alleged that a fence constructed to enclose the junk yard was constructed using vertical fence posts of varying lengths extending above the top of the horizontal fencing, creating unsightly and disorderly construction in violation of Section 4737.09, Revised Code.

Defendants, by answer and cross petition, impleaded new parties defendant to include the Auditor of Summit County, the Sheriff of Summit County, the Prosecuting Attorney of Summit County and the Attorney General of Ohio. The answer contained a general denial and set up defenses to the effect that their business was exempt and excluded from the application of the junk yard statutes and denied operation of the business in violation of the statutes and also denied that said business was a nuisance.

Defendants further alleged that the junk yard statutes violated the Constitution of the State of Ohio and the Con-

stitution of the United States in that said statutes were based solely on aesthetic considerations and therefore an unconstitutional exercise of the police power. They further alleged that the junk yard statutes were not capable of uniform application throughout the State of Ohio and were arbitrary and unreasonable and that said statutes failed to contain any standards of guidance and constituted an unlawful delegation of legislative power to the Prosecuting Attorney and to the Attorney General to apply for an injunction and abatement of the defendants' business as a nuisance. It was also alleged that the junk yard statutes deprived defendants of the use of their property and that the statutes were indefinite and not capable of interpretation and compliance. It was further alleged that the requirements for the licensing of junk yards was improper, invalid and contrary to law.

By cross petition defendants asked for a declaratory judgment praying the court for an order finding them exempt and excluded from the operation of the junk yard statutes, and in the alternative asking the court to determine the construction and validity of the statutes and to declare the rights, status and other legal relations of the parties thereunder and to declare the statutes unconstitutional and ineffective and without force of law.

The case was heard before the Court of Common Pleas and upon consideration of the pleading, evidence and briefs of counsel, the court was of the opinion that the defendants Buckley came within the purview of the junk yard statutes. The court held that defendants had substantially complied with the statute, but that in the exercise of the court's common law equitable jurisdiction a nuisance did exist and the defendants were ordered to perform certain corrective measures. The court later held that the junk yard statutes were not unconstitutional on the grounds of

being purely aesthetic in character or in their requiring the licensing of junk yards. The court held that that part of Section 4737.05, Revised Code, *et seq.*, dealing with (a) definition of fences, and (b) creating a legislative nuisance by the lack of same, and (c) providing enforcement, are vague, indefinite and unenforceable and cannot be uniformly applied to all junk yards and where scrap processing dealers are specifically exempted from the statutes, the statutes are thereby discriminatory, and therefore unconstitutional, null and void. The court enjoined the defendants Auditor, Sheriff, Prosecuting Attorney and Attorney General from exercising the powers and duties conferred upon them by the junk yard statutes as against defendants Buckley.

The Attorney General and the Prosecuting Attorney of Summit County appealed on questions of law and the defendants Buckley cross-appealed on questions of law.

The Court of Appeals reversed the judgment of the trial court which found that that part of Section 4737.05, Ohio Revised Code, as it pertains to "(a) definition of fences, and (b) creating a legislative nuisance by the lack of same, and (c) providing enforcement" was unconstitutional null and void. In all other respects the court affirmed the judgment of the trial court and dissolved the injunction.

Upon appeal to the Supreme Court of Ohio the judgment of the Court of Appeals was affirmed in a decision dated December 31, 1968.

ARGUMENT

It is true that appellant, in his original answer and cross-petition, alleged that the Ohio junk yard statutes were violative of the Constitution of the State of Ohio and the Constitution of the United States, but this was done in general terms and without specificity as to the

federal question. It is only upon a reading of the brief which the appellant filed in the trial court in support of motion for temporary injunctions and restraining orders and brief on the merits that a party to the action might understand the nature of the constitutional questions raised.

The brief claimed the junk yard statutes to be unconstitutional and invalid for the reasons following in original sequence:

1. That "the base and purpose of the (junk yard statutes) is esthetic conditions". The brief argues that statutes based solely on aesthetic considerations are an unconstitutional exercise of the police power.

2. That "the (junk yard statutes are) violative of Article II, Section 26 of the Ohio Constitution requiring all laws of a general nature to have a uniform operation throughout the state."

3. That "the (junk yard statutes are) unconstitutional as an unlawful delegation of legislative power."

4. That "the (junk yard statutes are) violative of the due process clauses of the Constitution of the United States and of the Ohio Constitution." Here the brief conjectures that if the fence required by the junk yard statutes is not, or cannot be erected, the plaintiff (appellant) is deprived of the use of his property without due process of law.

The brief further claims unconstitutionality of the statutes in their application to the appellant's junk yard on the allegation of impossibility of compliance.

At the subsequent trial in the lower court on the merits, the record, as portrayed by the bill of exceptions, reveals no evidentiary matter adduced as a basis for argument on the question of constitutional validity of the Ohio junk yard statutes. The federal question must be an essential and integral part of the plaintiff's case. *Tennessee* v. *Union*

& Planter's Bank, 152 U.S. 454, 14 S. Ct. 654, 38 L. Ed. 511. Mere references to the federal Constitution, laws or treaties and mere assertions that a federal question is involved are not sufficient to confer jurisdiction. *Starin* v. *New York,* 115 U.S. 248, 6 S. Ct. 28, 29 L. Ed. 388.

The issue of whether or not a statute based on aesthetic considerations is an unconstitutional exercise of the police powers does not present a substantial federal question. It is now a commonly accepted principle of the law that the police power is an attribute of sovereignty which the states have not surrendered to the federal government but rather expressly reserved to the states by the Tenth Amendment to the Constitution of the United States, and the mode of exercising the power is left to the discretion of the state. *South Carolina* v. *United States,* 26 S. Ct. 110, 113; 119 U. S. 437, 50 L. Ed. 261; *Jordan* v. *Gaines,* 8 A. 2d 585; 136 Me. 291; *C. A. King & Co.* v. *Horton,* 156 N.E. 124; 116 Ohio St. 205. It must follow that it is clearly within the power of the state courts to determine the questions arising out of the exercise of its police power and no issue of a federal question arises unless the courts have been arbitrary or capricious in reaching their decisions.

In *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176, 56 S. Ct. 159, 80 L. Ed. 138, 146, dealing with the legislative exercise of the police power, it was said, "When such legislative action is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary. The burden is not sustained by making allegations which are merely

the general conclusions of law or fact. Facts must be specifically set forth."

The issue of aesthetics as a basis for the exercise of the police power has been disposed of affirmatively as to the elements of this case by the Supreme Court of Ohio with strong precedent available from this Honorable Court in the case of *Berman* v. *Parker,* 348 U.S. 26, 33, 99 L. Ed. 27, 38. As a determination of a question arising out of the exercise of the state's own police powers, it seems evident that the decision is clearly a state matter and does not turn on a federal question.

With regard to the question of uniform enforcement, this was an issue raised in the appellant's original brief under the Ohio Constitution, as was the claim of discriminatory treatment of junk yards as opposed to scrap yards. These matters have been decided by the courts below on the basis of long standing Ohio law that where police legislation may be confined to certain measures the fact that it does not cover the entire field of similar possible abuses does not render such legislation invalid. *Yee Bow* v. *City of Cleveland,* 99 Ohio St. 269; *Grown* v. *City of Cleveland,* 125 Ohio St. 455; *City of Xenia* v. *Schmidt,* 101 Ohio St. 437. Furthermore, in *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157, 160, it was said by Justice Holmes:

> "* * * If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law."

Even with reference to the Fourteenth Amendment, this Honorable Court has held in *McGowan* v. *Maryland,* 366 U. S. 420, 6 L. Ed. 2d 393, 399 that:

> "The Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect

> some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective."

The construction of state statutes belongs to the state courts, and is not a federal question, unless the state court gives such a construction to a state statute as to make it conflict with the Constitution or laws of the United States. See *Phoenix Insurance Co.* v. *Gardiner,* 11 Wall. 204, 20 L. Ed. 112.

The contentions that Ohio's junk yard statutes are vague and indefinite in the definition of fences, in creating a legislative nuisance by the lack of same, in their provisions for enforcement, and that they are unconstitutional as an unlawful delegation of legislative power, have been held to be without merit by the lower courts in the exercise of their duty to give a reasonable construction so as to give effect to the statutes as a whole. The Ohio courts followed the rule of *Eastman* v. *The State of Ohio,* 131 Ohio St. 1, which sets forth the following guidelines:

> "A statute cannot be held invalid for uncertainty if any reasonable and practical construction can be given to its language; mere difficulty in ascertaining its meaning, or the single fact that it is susceptible of different interpretations will not necessarily render it nugatory; it is the duty of its courts to endeavor by every rule of construction to ascertain its meaning and give full force and effect to, every enactment of the General Assembly not obnoxious to Constitutional prohibition.
>
> "Words in common use will be construed in their ordinary acceptation and significance and with the meaning commonly attributed to them."

The courts had little difficulty in finding the definitions capable of ordinary interpretation. This Honorable Court has pointed out in *Bauman* v. *Ross,* 167 U. S. 548, 17 S. Ct.

966, 42 L. Ed. 270, 290, that, with respect to acts of Congress, it is only when no other reasonable construction can be supported, that such an act can be declared to be unconstitutional and void, or invalid for any cause. It is respectfully submitted that the appellant has failed to show by the evidence or argument deducible from the evidence that "*no other* reasonable construction" can be supported to exclude the practical construction found.

The Ohio courts have also found that the so-called unlawful delegation of legislative power is not at all a delegation of legislative power, but merely the provision of enforcement procedures for failure of compliance. Moreover the Ohio General Assembly has not legislated a statutory nuisance, but rather, by clear and explicit terms of the statute itself, left that determination to the courts with remedial procedures encompassing relief to all parties.

The appellant, in seeking jurisdiction of this Honorable Court, relies now most strongly on the proposition that requiring the junk yard to be obscured from the ordinary view of persons passing on the state, county and township roads, is a taking of property without due process where the yard cannot be obscured due to topographical conditions, and that by extension of this argument to the property of the appellant the statutes are unconstitutional in their application to appellant's property for impossibility of compliance.

It is provided in Section 19, Article I of the Ohio Constitution that,

> "Private property shall ever be held inviolate but subservient to the public welfare."

The general rule in Ohio, as elsewhere, is that the General Assembly may provide that a particular use of land shall be unlawful even though that use had theretofore

been lawful. See *Ghaster, Inc.* v. *Preston,* 176 Ohio St. 425, 430, and *City of Akron* v. *Klein,* 171 Ohio St. 207. There is ample precedent in this Honorable Court for such a view. See *Buchanan* v. *Worley,* 245 U. S. 60, 38 S. Ct. 16, 62 L. Ed. 149, 155, wherein it was said, "The use of property and the liberty of contract are always subject to reasonable police regulations, and their enforcement does not deprive a person of property without due process of law." See also *Crawley* v. *Christensen,* 137 U. S. 86, 11 S. Ct. 13, 34 L. Ed. 620, 623. In the case of *McKee* v. *City of Akron,* 176 Ohio St. 282, it was held that depriving of an owner of land of the unrestricted use of his land will not necessarily amount to a taking of his property. It is respectfully submitted that the junk yard statutes of Ohio merely provide for a restraint on the manner in which the junk yard operator uses his land, and there has been no evidence in this case, nor argument deducible from the evidence that there has been a taking, other than the conjectural possibility of a situation where it would be impossible to obscure the junk within a junk yard enclosure by any type of fence or natural objects.

The appellant cites *Berman* v. *Parker* 348 U. S. 26, 33 for the proposition that "the rights of the property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of taking." It must be remembered that *Berman* was a case involving the exercise of the power of eminent domain. The case of *Mugler* v. *Kansas,* 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205, 213 involved an interpretation of the Kansas prohibition law. There it was said,

> "As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A

prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by anyone, for certain forbidden purposes is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury on their community."

The problem of impossibility of compliance as to the appellant's property was effectively laid to rest by the trial court when it found that certain practical modifications to the existing fencing arrangement around appellant's property and a reasonable disposition of the junked cars therein would provide compliance with the statute. Moreover the court held that with such compliance it would be unnecessary to hear the Constitutional question. See Appendix A herein, Decision of the Court of Common Pleas of Summit County, which was first rendered in the trial of this case.

CONCLUSION

It is respectfully urged that this Motion to Dismiss be sustained for the reason that the case does not present a substantial federal question but rather that the judgment rests on an adequate non-federal basis through the state courts' interpretation and construction of the state's own police powers; or in the alternative that the judgment of the Supreme Court of Ohio be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial in the light of well settled law as not to need further argument.

Respectfully submitted,

PAUL W. BROWN,
Attorney General of Ohio
ROBERT D. MACKLIN,
Assistant Attorney General
State House Annex,
Columbus, Ohio 43215,
Counsel for Appellee,
Attorney General of Ohio.

APPENDIX

APPENDIX A

STATE OF OHIO
SUMMIT COUNTY } ss:

IN THE COURT OF COMMON PLEAS

Case No. 250017

STATE OF OHIO, by JAMES V. BARBUTO,
Prosecuting Attorney, Summit County, Ohio,
Plaintiff,

vs.

CHARLES E. and ROBERT E. BUCKLEY,
dba Buckley's Auto Wrecking, 2977 Manchester Road,
Akron 19, Ohio,
Defendant.

DECISION OF COURT

Court finds, first of all, that the defendant has made an effort to comply with the Statute and should be commended for this action. However, he falls short of full compliance within the meaning and purpose of the Statute, as follows:

1—The fence along Manchester Road on each side of the building should be increased in height by a two foot (2′) steel panel similar to the existing fence.

2—The Cove Road fence is satisfactory.

3—The Cormanny Road existing fence should be raised to close to ground level and then an additional two foot (2′) panel placed on top, increasing the height by two feet (2′).

4—The fence in the rear should be increased by a two foot (2′) panel.

5—All poles should then be cut level with the top of the fence.

6—Cars cannot be piled more than two (2) high.

7—No junked autos are to be left in the front on Manchester Road.

If the defendant desires to comply with the above order within thirty (30) days, it will be unnecessary to hear the Constitutional question raised in the cross petition and an entry may be submitted accordingly. Otherwise, counsel should notify the Court if additional proceedings are necessary.

/s/ T. W. MITCHELL
T. W. Mitchell, Judge
(By Assignment)

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1209.

CHARLES E. and ROBERT E. BUCKLEY
dba BUCKLEY'S AUTO WRECKING,
Appellants,

vs.

STATE OF OHIO, by JAMES V. BARBUTO,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

MOTION TO DISMISS OR AFFIRM.

JAMES V. BARBUTO,
Prosecuting Attorney,
Summit County, Ohio,
City-County Safety Building,
53 E. Center Street,
Akron, Ohio 44308,
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In the Supreme Court of the United States

OCTOBER TERM, 1968.

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CHARLES E. and ROBERT E. BUCKLEY
dba BUCKLEY'S AUTO WRECKING,
Appellants,

vs.

STATE OF OHIO, by JAMES V. BARBUTO,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

MOTION TO DISMISS OR AFFIRM.

James V. Barbuto, Prosecuting Attorney of Summit County, Ohio, Appellee in this case, respectfully moves this Court, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, to dismiss this appeal on the ground that it does not present a substantial federal question and that the judgment rests on an adequate non-federal ground, or, in the alternative, to affirm the judgment of the Supreme Court of Ohio on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE.

On January 30, 1965, James V. Barbuto, Prosecuting Attorney of Summit County filed an application under Section 4734.11, Ohio Revised Code, in the Court of Common Pleas of Summit County to enjoin the named defendants, Charles E. and Robert E. Buckley, doing business as Buckley's Auto Wrecking, from further operation of their

junk yard located at 2977 Manchester Road, Akron, Ohio, and to have said junk yard abated as a nuisance.

The application alleged facts to bring the operation of the junk yard within the junk yard licensing statute, Sections 4737.05 to 4737.11, inclusive, and Section 4737.99 of the Ohio Revised Code. It was also alleged that the junk yard was being operated in violation of Section 4737.07, Revised Code, in that it was being operated without a fence of the specified height and construction and maintained so as to obscure the junk in the enclosure from the ordinary view of persons passing upon the road. It was further alleged that a fence constructed to enclose the junk yard was constructed using vertical fence posts of varying lengths extending above the top of the horizontal fencing, creating unsightly and disorderly construction in violation of Section 4737.09, Revised Code.

Defendants, by answer and cross petition, impleaded new parties defendant to include the Auditor of Summit County, the Sheriff of Summit County, the Prosecuting Attorney of Summit County and the Attorney General of Ohio. The answer contained a general denial and set up defenses to the effect that their business was exempt and excluded from the application of the junk yard statutes and denied operation of the business in violation of the statutes and also denied that said business was a nuisance.

Defendants further alleged that the junk yard statutes violated the Constitution of the State of Ohio and the Constitution of the United States in that said statutes were based solely on aesthetic considerations and, therefore, an unconstitutional exercise of the police power. They further alleged that the junk yard statutes were not capable of uniform application throughout the State of Ohio and were arbitrary and unreasonable and that said statutes failed to contain any standards of guidance and

constituted an unlawful delegation of legislative power to the Prosecuting Attorney and to the Attorney General to apply for an injunction and abatement of the defendants' business as a nuisance. It was also alleged that the junk yard statute deprived defendants of the use of their property and that the statute was indefinite and not capable of interpretation and compliance. It was further alleged that the requirement for the licensing of junk yards was improper, invalid and contrary to law.

By cross petition defendants asked for a declaratory judgment praying the court for an order finding them exempt and excluded from the operation of the junk yard statutes, and in the alternative asking the court to determine the construction and validity of the statutes and to declare the rights, status and other legal relations of the parties thereunder and to declare the statutes unconstitutional and ineffective and without force of law.

The case was heard before the Court of Common Pleas and upon consideration of the pleading, evidence and briefs of counsel, the court was of the opinion that the defendants Buckley came within the purview of the junk yard statutes. The court held that defendants had substantially complied with the statute, but that in the exercise of the court's common law equitable jurisdiction a nuisance did exist and the defendants were ordered to perform certain corrective measures. The court further held that the junk yard statutes were not unconstitutional on the grounds of being purely aesthetic in character or in their requiring the licensing of junk yards. The court held that that part of Section 4737.05, Revised Code, *et seq.*, dealing with (a) definition of fences, and (b) creating a legislative nuisance by the lack of same, and (c) providing enforcement, are vague, indefinite and unenforceable and cannot be uniformly applied to all junk

yards and where scrap processing dealers are specifically exempted from the statutes, the statutes are thereby discriminatory, and therefore, unconstitutional, null and void. The court enjoined the defendants Auditor, Sheriff, Prosecuting Attorney, and Attorney General from exercising the powers and duties conferred upon them by the junk yard statutes as against defendants Buckley.

The Attorney General and the Prosecuting Attorney of Summit County appealed on questions of law and the defendants Buckley cross-appealed on questions of law.

The Court of Appeals reversed the judgment of the trial court which found that that part of Section 4737.05, Ohio Revised Code, as it pertains to "(a) definition of fences, and (b) creating a legislative nuisance by the lack of same, and (c) providing enforcement" was unconstitutional, null and void. In all other respects the court affirmed the judgment of the trial court and dissolved the injunction.

Upon appeal to the Supreme Court of Ohio the judgment of the Court of Appeals was affirmed in a decision dated December 31, 1968.

ARGUMENT.

The appellant, in his original answer and cross-petition, alleged that the Ohio junk yard statutes violated the Constitution of the State of Ohio and the Constitution of the United States. This was done without assigning a specific federal question. His brief filed in the trial court assigned specific reason for his claim of unconstitutionality of the statutes. However, at the trial of the cause, as demonstrated by the bill of exceptions, no evidence was adduced that would support appellants' argument on the question of the constitutional validity of the Ohio junk yard statutes.

The issue of whether or not a statute based solely on aesthetic considerations is an unconstitutional exercise of the police power has been presented to this Honorable Court in *Desert Outdoor Advertising, Inc. v. San Bernardino City,* Docket No. 114, wherein at the October Term 1968 a motion to dismiss the appeal was granted and the appeal was dismissed for want of a substantial federal question.

This Court in *Berman v. Parker,* 348 U.S. 26, 99 L. Ed. 27, stated:

> "The concept of the public welfare, for the purpose of which the legislature may exercise its police power, is broad and inclusive, and the values it represents are spiritual and esthetic, as well as physical and monetary."
>
> "A determination that the public welfare requires the community to be beautiful, spacious, and well balanced, as well as healthy, clean, and carefully patrolled, is within the power of the legislature."

We respectfully submit that the question of esthetic considerations for legislation having been determined by this Court to be a proper exercise of the police power of the various states no federal question is present here.

We respectfully direct the Court's attention to the bill of exceptions and the questions: (1) Does a requirement that a junk yard be obscured from the ordinary view of persons passing on the roads take property without due process of law where the yard cannot be obscured due to topographical conditions? and (2) Are the statutes unconstitutional in their application to appellant Buckleys' property?

The record is completely void of evidence that appellants' property cannot be obscured due to topographical conditions or in any manner taken. The trial court found

to the contrary: It found that with certain practical modifications to the existing fence and a reasonable disposition of the junk cars therein the appellant would comply with the requirements of the statute.

The law in Ohio is that the General Assembly may provide that a particular use of land shall be unlawful even though that use had heretofore been lawful. *Ghaster, Inc. v. Preston,* 176 Ohio St. 425, *McKee v. City of Akron,* 176 Ohio St. 282, held that depriving an owner of the unrestricted use of his land does not necessarily amount to a taking of his property.

We, therefore, respectfully submit that the statutes in question simply restricts the manner in which the junk yard operator may use his land. It does not disturb the owner in the control or use of his property or restrict his right to dispose of it. In the absence of any evidence of a taking no substantial federal question is raised.

Ohio courts follow the rules set out in *Eastman v. The State of Ohio,* 131 Ohio St. 1, in construing statutes. Those rules are:

> "A statute cannot be held invalid for uncertainty if any reasonable and practical construction can be given to its language; mere difficulty in ascertaining its meaning, or the single fact that it is susceptible of different interpretations will not necessarily render it nugatory; it is the duty of its courts to endeavor by every rule of construction to ascertain its meaning and give full force and effect to, every enactment of the General Assembly not obnoxious to Constitutional prohibition."
>
> "Words in common use will be construed in their ordinary acceptation and significance and with the meaning commonly attributed to them."

Following these rules the courts below found appellants' contention that the statutes were vague and indefi-

nite in the definition of fences, in creating a legislative nuisance by the lack of same, and in their provision for enforcement to be without merit.

This Honorable Court in *Berman v. Ross,* 167 U. S. 548, 17 S. Ct. 966, said with respect to acts of Congress, it is only when no other reasonable construction can be supported, that such an act can be declared to be unconstitutional and void or invalid for any cause. It is respectfully submitted that the appellant has failed to show by evidence or argument that no other reasonable construction can be supported to the exclusion of that of the Courts below.

The courts below found no unlawful delegation of legislative power but that this so-called unlawful delegation of legislative power was merely an enforcement procedure for failure to comply. The statute is clear: It left the determination of whether or not a nuisance exists to the court.

Upon the authority of *Cramp v. Board of Public Instruction of Orange County, Fla.,* 82 S. Ct. 275, 368 U. S. 278, 7 L. Ed. 2d 285, we respectfully submit that this Court accept the Ohio courts' construction of these statutes.

With respect to appellants' argument that the statutes deny equal protection of the laws by being discriminatory in exempting scrap yards therefrom as distinguished from auto wrecking yards, it is generally recognized that when a legislative body decides to correct a particular evil, it need not correct all at once. *Yee Bow v. City of Cleveland,* 99 Ohio St. 269; *City of Xenia v. Schmidt,* 101 Ohio St. 437. Furthermore, in *Central Lunber Co. v. South Dakota,* 226 U.S. 157, 160, it is stated by Justice Holmes:

> "* * * If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be

dealt with although otherwise and merely logically not distinguishable from others not embraced in the law."

Justice Brandeis said in *Zucht v. King*, 43 S. Ct. 24, 260 U. S. 174, 67 L. Ed. 194:

> "A long line of decisions by this Court has also settled that in the exercise of the police power reasonable classification may be freely applied and that regulation is not violative of the equal protection clause merely because it is not all-embracing."

CONCLUSION.

It is respectfully urged that this Motion to Dismiss be sustained for the reason that the case does not present a substantial federal question but rather that the judgment rests on an adequate non-federal basis through the state courts' interpretation and construction of its own police powers; or in the alternative that the judgment of the Supreme Court of Ohio be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial in the light of well-settled law as not to need further argument.

Respectfully submitted,

JAMES V. BARBUTO,
Prosecuting Attorney,
Summit County, Ohio,
City-County Safety Building,
53 E. Center Street,
Akron, Ohio 44308,
Attorney for Appellee.

APPENDIX.

DECISION OF THE COURT OF COMMON PLEAS.

Court finds, first of all, that the defendant has made an effort to comply with the Statute and should be commended for this action. However, he falls short of full compliance within the meaning and purpose of the Statute, as follows:

1. The fence along Manchester Road on each side of the building should be increased in height by a two foot (2′) steel panel similar to the existing fence.

2. The Cove Road fence is satisfactory.

3. The Cormanny Road existing fence should be raised to close to ground level and then an additional two foot (2′) panel placed on top, increasing the height by two feet (2′).

4. The fence in the rear should be increased by a two foot (2′) panel.

5. All poles should then be cut level with the top of the fence.

6. Cars cannot be piled more than two (2) high.

7. No junked autos are to be left in the front on Manchester Road.

If the defendant desires to comply with the above order within thirty (30) days, it will be unnecessary to hear the Constitutional question raised in the cross petition and an entry may be submitted accordingly. Otherwise, counsel should notify the Court if additional proceedings are necessary.

/s/ T. W. MITCHELL
T. W. Mitchell, *Judge*
(By Assignment).

STATUTES.

Section 4737.05, Ohio Revised Code:

"As used in sections 4737.05 to 4737.11, inclusive, of the Revised Code:

"(A) 'Junk' means old or scrap copper, brass, rope, rags, batteries, paper, rubber, junked, dismantled, or wrecked automobiles or parts thereof, iron, steel, and other old or scrap ferrous or non-ferrous materials which are not held for sale for remelting purposes by an establishment having facilities for processing such materials.

"(B) 'Junk yard' means an establishment or place of business, other than an establishment having facilities for processing iron, steel, or non-ferrous scrap and whose principal product is scrap iron and steel or non-ferrous scrap for sale for remelting purposes, which is maintained or operated for the purpose of storing, keeping, buying, or selling junk, or for the maintenance or operation of an automobile graveyard, except an establishment or place where automobiles, wrecked or otherwise, are held or impounded for a period not to exceed ninety days exclusively for storage, repair, or resale without alteration.

"(C) 'Fence' means an enclosure at least six feet in height, constructed of non-transparent material, and maintained so as to obscure the junk in the enclosure from the ordinary view of persons passing upon the state, county, and township roads in this state."

Section 4737.06, Ohio Revised Code:

"No person shall operate or maintain a junk yard outside a municipality unless he has first obtained a license issued under sections 4737.05 to 4737.11, inclusive of the Revised Code.

"No licensee shall operate or maintain a junk yard in violation of the provisions of sections 4737.05 to 4737.11, inclusive, of the Revised Code."

Section 4737.07, Ohio Revised Code:

"No person shall operate and maintain a junk yard outside of a municipality without first obtaining a license to do so from the county auditor of the county in which such junk yard is located or in which such junk yard is to be established. A person who was operating or maintaining a junk yard prior to January 1, 1964 is entitled to be issued a license or renewal thereof upon payment of the fee provided for in this section. Any person operating or maintaining a junk yard within one thousand feet of a state or county road or within three hundred feet of a township road, prior to January 1, 1964, shall have one year thereafter to erect the required fence if such junk yard is not obscured by natural objects. If, after January 1, 1964, a junk yard is established within one thousand feet of a state or county highway or within three hundred feet of a township road, it must be so located that the view thereof from such road is obscured by natural objects or a fence. If the yard is so obscured, the person operating or maintaining it shall be entitled to a license.

"The fee for a license under this section is twenty-five dollars. All licenses issued under this section shall expire on the first day of January following the date of issue. A license may be renewed from year to year upon paying the auditor of the county in which the junk yard is located the sum of ten dollars for each such renewal.

"All fees paid under this section are for the use of the county which issues the license or renewal thereof.

"Any license or renewal thereof issued under this section may be revoked by the county auditor of the county in which the licensee's junk yard is located, after reasonable notice and opportunity to be heard, for any violation of sections 4737.01 to 4737.11, inclusive of the Revised Code, by the licensee or by any of his officers, agents, or employees. Whenever a license has been revoked under this section, the county auditor shall not issue another license to such licensee, to the husband or wife of such licensee, or to any partnership or corporation of which he is an officer or member, until the expiration of at least one year from the date of revocation of such license."

Section 4737.08, Ohio Revised Code:

"Application for a license to operate and maintain a junk yard or for a renewal thereof shall be made in writing, accompanied by the proper fee, to the county auditor of the county in which the junk yard is located or in which it is to be established, setting forth the name and address of the applicant, the location of the junk yard, if the applicant is a firm, partnership, or association, the names and addresses of each member, if the applicant is a corporation, the date and place of incorporation and the names and addresses of its officers and directors, and such other reasonable information as the county auditor deems necessary. The application shall be signed and sworn to by the applicant."

Section 4737.09, Ohio Revised Code:

"Any fence constructed under sections 4737.05 to 4737.11, inclusive, of the Revised Code, shall be neatly constructed, shall be non-transparent, shall be kept in good order and repair, and no advertisement shall be permitted thereon other than the name of the person under

whose name the license has been issued and the nature of the business conducted therein."

Section 4737.10, Ohio Revised Code:

"Twice annually the Sheriff of each county shall inspect every junk yard that is located within his jurisdiction and for which a license has been issued under sections 4737.05 to 4737.11, inclusive, of the Revised Code, to obtain information with regard to whether the licensee's business has been and is being conducted in accordance with sections 4737.01 to 4737.11, inclusive, of the Revised Code. The Sheriff shall submit a written report of each such examination to the County Auditor wherein such junk yard is located.

"The Sheriff shall, for the purpose of this examination, have free access to the grounds and buildings used in the conduct of the junk yard business by the licensee.

"Such inspections may be made at any time, at the option of the sheriff, during the regular work hours of the licensee or within the hours of eight a.m. and five p.m. Monday through Friday."

Section 4737.11, Ohio Revised Code:

"Whenever the prosecuting attorney of any county or the attorney general is of the opinion that a junk yard is being operated or maintained in violation of any of the provisions of sections 4737.05 to 4737.11, inclusive, of the Revised Code, he may apply, in the name of the state, to a court of competent jurisdiction, alleging the violation complained of and praying for an injunction or other proper relief. In such a case, the court may order such junk yard abated as a nuisance or make such other order as may be proper. An action brought under this section shall not be deemed to be a bar to a prosecution under section 4737.99 of the Revised Code."

Section 4737.99, Ohio Revised Code:

"(A) Whoever violates sections 4737.01 to 4737.11, inclusive, of the Revised Code, shall be fined not less than twenty-five nor more than one thousand dollars and the costs of prosecution."

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

BUCKLEY ET AL. *v.* OHIO BY BARBUTO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 1209. Decided May 19, 1969.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.